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The Quest to Find a Law Applicable to Contracts in the European Union - A Summary of Fragmented Provisions

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The Quest to Find a Law Applicable to Contracts in the European Union - A Summary of Fragmented Provisions*

Tamas Dezso Czigler and Izolda Takacs

Abstract

In the European Union Regulation No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (the so called Rome I regulation) governs which law to apply to contracts containing international elements. With the continuing internalization of business activities, such rules have elementary importance. However, beside the unified rules of the regulation, numerous EU rules exist, which also have relevance. This is because of a provision in Rome I, which states that the regulation shall not prejudice the application or adoption of rules of the institutions of the EU which lay down rules concerning particular areas of contractual law. As an effect, several rules exist which override the provisions of Rome I. Thus, the present system of rules is fragmented, which may cause serious malfunctions in the legal practice. Most of these provisions can be found in consumer law directives, but other fields like employment law may also be of relevance. The article tries to collect these hidden" provisions and analyze their effect to the Hungarian legal regime.

KEYWORDS: Rome I regulation, contracts, applicable law, private international law, choice-of-law, consumer law, EU law, consumer contracts, legal fragmentation

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INTRODUCTION

Beyond any doubt, the last few years have brought a wonderful evolution, a “Private International Law (PIL) boom”¹ to the European Union in.² Several new regulations have been adopted, which form the so called “Rome Regime”. One of the most important among them is the Rome I. Regulation on the law applicable to contractual obligations (hereinafter referred to as: “the Rome I Regulation” or “Rome I”).³ Latter regulation contains the rules on the choice of applicable law to contracts in Europe. Before its adoption, there were no community instruments that would have covered a broader scope of international relationships regarding applicable law to contracts in the European Community – that was the reason why Member States (MSs) concluded the 1980 Rome Convention.

In the early days then, there had been only fragmented and miscellaneous conflict-of-laws provisions in the *acquis communautaire*, focusing on specific areas. Most provisions were to be found in directives dealing with substantive law, i.e. the conflict-of-laws rules were merely extensions to the regulations in certain areas. Adopting such rules was common in the fields of consumer protection (i.e. consumer contract law) and insurance law. Numerous authors had criticized this earlier technique, which resulted in the commination of Community conflict-of-laws rules.⁴ There were indeed several

1. If we review the roots and historical background of this evolution, there is good reason to call it a new European choice of law revolution as certain authors do: see Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607-1644 (2008).

2. Jona Israël, *Conflicts of Law and the EC after Amsterdam - A Change for the Worse?* 7 MAASTR. J. OF EU. AND COMP. L. 81-100 (2000); Jürgen Basedow, *The Communitarization of the Conflict of Laws Under the Treaty of Amsterdam*, 37 COM. M. L. REV. 687-691 (2000); Oliver Remien, *European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice*. 38 COM. M. L. R. 53-86 (2001).

3. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177, 2008.07.04, 6 Cf. Gralf-Peter Callies, ROME REGULATIONS 17-353 (2011); Franco Ferrari, & Stefan Leible, ROME I REGULATION (2009); Stefan Leible & Matthias Lehmann, *Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht ("Rom I")* 54 R. D. INT. WIRTSCH. 528-543 (2008); Peter Mankowski, *Die Rom I-Verordnung – Änderungen im europäischen IPR für Schuldverträge*. 7 INT. HANDELSR. 133-152 (2008); Thomas Pfeiffer, *Neues Internationales Vertragsrecht – Zur Rom I-Verordnung*. 19 EUR. ZEITSCHR. F. WIRTSCHAFTSR. 622-629 (2008) Richard Plender & Michael Wilderspin, THE EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS 93-434 (2009) Peter Stone, EU PRIVATE INTERNATIONAL LAW 287-346 (2010); Christian von Armbrüster & Werner F. Ebke & Rainer Hausmann & Ulrich Magnus, STAUDINGER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH - EINLEITUNG ZU ROM I-VO (2011); Christian Armbrüster & Rainer Hausmann & Ulrich Magnus: ART. 1-10 ROM I-VO (2011); Ulrich Magnus & Christian Armbrüster & Werner F. Ebke & Rainer Hausmann, ARTIKEL 11-29 ROM I-VO; ARTIKEL 46 B, C EGBGB, (2011); Rolf Wagner, *Der Grundsatz der Rechtswahl und das mangels Rechtswahl anwendbare Recht (Rom I-Verordnung) - Ein Bericht über die Entstehungsgeschichte und den Inhalt der Artikel 3 und 4 Rom I-Verordnung*, 28 IPRA – PRAX. D. INT. PR. U. VERFAHRENSR. 377-386 (2008).

4. Just to mention a few of them: Jürgen Basedow, *Europäisches internationales Privatrecht*, 49 NEUE JUR. WOCHENSCHR. 1929 (1996); Ralf Michaels & Hans-Georg, *Europäisches Verbraucherschutzrecht und IPR*, 52 JURISTENZ. 608 (1997); Stefan Klkauer, *Das europäische Kollisionsrecht der Verbraucherverträge zwischen Römer EVÜ und EG-Richtlinien* 138 (2002).

disadvantages of the early approach. Firstly, the PIL body of law adopted for particular areas became opaque and convoluted. Secondly, in several cases the European legislator only provided a kind of “supra-collisional” rule, or to be more precise, a rule defending some provisions of Community law.⁵ That is to say, the Community PIL rules were only to be applied if doing otherwise, some substantive rules of EU/Community law would have been violated. This approach made the system unpredictable. Thirdly, the solutions for implementing these rules into MSs’ national statutes seem rather diverse and sometimes inconsistent with each other.⁶ Fourthly, EU/Community rules also disrupted existing and functioning national systems. This was the case for insurance law: EU/Community law reinvented effective national insurance law and in some places, rewrote the rules using ill-chosen constructs. Due to the above, the PIL *aquis* on insurance contracts became almost chaotic. Adopting regulations with a wider scope or the assembling of such regulations as was done in the Rome I Regulation can be considered to be a great leap forward, even if the methods of codification in the Regulation warrant some criticism.⁷ Last but not least, some “hidden” PIL rules were codified in directives: this made their application even more difficult, since the direct effect of directives not implemented by MSs is ambiguous.⁸

Latter rules are part of the “cloaked” EU PIL provisions (as mentioned, they are attached to substantive rules). Similar PIL rules can be found in the judgments of the ECJ and in some “hidden” rules on inner market as well – i.e. these are the three subgroups of “cloaked EU PIL provisions”. The issue of the first group was partially resolved by the adoption of the Rome I Regulation on the law applicable to contracts, which replaced the rules of the Rome Convention concerning contracts concluded after December 17, 2009.⁹ Art. 23 of Rome I Regulation attempts to settle the relationship of the Regulation with other sources of EU law in just one complex sentence: this is the core of the problem examined in the present paper. According to the text,

*“with the exception of Article 7 [i.e. the provisions on insurance contracts – the authors], this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-laws rules relating to contractual obligations.”*¹⁰

5. We could call these substantive provisions mandatory or imperative rules, but their internationally mandatory character is subject of debate, see Dieter Martiny (Hrsg.) INTERNATIONALES VERTRAGSRECHT, 1287-1288 (2011).

6. Lajos Vékás, *Der Weg zur Vergemeinschaftung des Internationalen Privat und Verfahrensrecht – eine Skizze*, in Petar Šarčević & Johan Erauw & Vesna Tomljenović & Paul Volken (Eds.), LIBER MEMORIALIS PETAR ŠARČEVIC: UNIVERSALISM, TRADITION AND THE INDIVIDUAL 178-179 (2006).

7. Helmut Heiss, *Insurance Contracts in Rome I: Another Recent Failure of the European Legislature*, YEARB. OF PR. INT. L. 261-283 (2008).

8. INTERNATIONALES VERTRAGSRECHT, *supra* note 1, at 1286; Michaels & Kammann, *Europäisches Verbraucherschutzrecht...* *supra* note 1, at 605-607.

9. To contracts concluded earlier the 1980 Rome Convention on the law applicable to contracts must be applied.

10. For a comprehensive general analysis see STAUDINGER KOMMENTAR – EINLEITUNG ZU..., *supra* note 1 at Rn 32-40; STAUDINGER KOMMENTAR, ARTIKEL 11-29 ROM I-VO... *supra* note 1 at ARTIKEL 23 – Verhältnis zu anderen Gemeinschaftsrechtsakten Rn 1-31.

This effectively means that – excepting provisions on insurance contracts – all EU legislation containing choice-of-law rules precede the application of the Regulation. Rules governing consumer protection and everything else – again, except for provisions on insurance contracts – remain in force. If a conflict arises between a piece of EU legislation and the Rome I Regulation, the general rule is to apply the provisions of said legislation instead of the Regulation. In most cases, Rome I functions as a fundamental source of law: it may only be cast aside if there is a conflict between the law chosen on the basis of its rules and another piece of EU legislation and when the provisions of the latter have the attributes to ascertain its direct effect, or when the latter has been transcribed into national law.

Hence, in the first part of the article we review the EU provisions that alter the application of the Rome I Regulation. This part is divided to two main topics: we will firstly check the non-consumer legislation, which may have relevance in special relationships like employment relations, carriage contracts, etc. Moreover, we will summary the existing consumer law *acquis*. The latter is a huge material, with numerous sources and quite chaotic architecture. However, consumer law rules have the most important effect to EU private international contract law, and make the usage of EU law extremely difficult.

In the second part of the paper, we will examine the transition of these provisions into Hungarian law. Beside analyzing the European background and concentrating on the different groups of EU PIL rules, it can be interesting to show the particulars of the implementation of those fragmented rules into the authors' own, Hungarian legal system. The question has theoretical and practical importance even though Hungary is only a mid-sized European country: it is a good example of EU legal system fragmentation seeping into a MS's legal system. Consequently, the way Hungary has implemented the rules may have lessons for other nations as well. Most of the MSs face difficulties when implementing EU legal sources into their own system – we try to introduce how these difficulties were solved or not solved by the Hungarian legislator. We use the above mentioned structure concerning national rules as well: we firstly review the relevant non-consumer law rules (acts), and thereafter start to summarize consumer law rules.

I. EU LEGAL SOURCES AMENDING THE APPLICATION OF THE ROME I REGULATION

A. Non-Consumer Legislation

1. Directive on Commercial Agents¹¹

The first directive to review is Directive 86/653/EEC on self-employed commercial agents. The main purpose of this Directive was to provide protection to commercial agents *vis-à-vis* their principals, to facilitate concluding commercial representation contracts and to safeguard associated commercial transactions. In the context of the Directive, the concept of a “commercial agent” means a self-employed intermediary who has the right to negotiate or negotiate and conclude the sale or the purchase of goods on behalf of and in the name of another person (the principal). The law sets out the rights and obligations of the parties, the remuneration of the agents and the process of conclusion and termination of their contract.¹²

The Directive itself does not contain any *expressis verbis* PIL rules. Furthermore, we find no guidelines concerning its scope of application either. Therefore for this purpose, MSs have had to include in their legal systems additional governing rules, which are applied when a MS’s court rules in a case involving a commercial agent contract. However, in certain areas, the law articulates that the parties are not allowed to apply conditions in their agreement that are different (detrimentally to the commercial agent) from those set out in the Directive. Such provisions affect the following articles:

- Articles on the rights and obligations of the parties (Art. 3 and 4)
- Rules on commission for the agent (Art. 10 and 11)
- Information given to the agent and the information relevant for establishing the amount of commission (Art. 12)
- Indemnity of the agent (Art. 17 and 18).

In these cases, either the parties are not permitted to derogate the provisions of the Directive (for Art. 3 and 4) or, in the case of the other articles, must not conclude an agreement to the detriment of the commercial agent.

11. Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. OJ L 382, 31.12.1986, 17.

12. For the background of agency contracts in the EU see Study Group on a European Civil Code [Martijn W. Hesselink & Jacobien W. Rutgers & Odavia Buen Díaz & Manola Scotton & Muriel Veldman (eds.)], *PRINCIPLES OF EUROPEAN LAW ON COMMERCIAL AGENCY, FRANCHISE AND DISTRIBUTION CONTRACTS* (PEL CAFDC) (2006); Nicole Van Crombrughe, *The Agency Agreement Under Belgian Law*, 9 INT. HANDELSR. [INT. COM. L.] 89-97 (2009); For the UK background see *AGENCY AND DISTRIBUTION CONTRACTS IN THE EUROPEAN UNION*, available at http://www.elgroup.org/trento_documents/united_kingdom.pdf (Sept. 30, 2011).

There have been several proceedings conducted before the ECJ concerning this Directive. The first, well known and controversially interpreted matter is the so called *Ingmar* case:¹³ a Californian company called Eaton Leonard Technologies Inc. concluded a commercial agent contract with Ingmar GB Ltd, a company established in the UK. They chose California law to apply to their contract: this would have harmed Ingmar's rights (derived from the Directive) to receive compensation for damages suffered because of termination of the contract.¹⁴ Art. 19 of the Directive expresses that "*the parties may not derogate from Articles 17 and 18* [from the rules on compensation for damages – the authors] *to the detriment of the commercial agent before the agency contract expires*. Consequently, the ECJ ruled that the Directive's relevant provisions have an internationally mandatory nature and therefore must be applied even if the law chosen by the parties would set it out differently. This also applies to cases in which there was no choice-of-law made by the parties. These fundamental principles have been affirmed in other cases¹⁵ such as *de Zotti*¹⁶.

Thus, the rules of the Directive are considered to override internationally mandatory (imperative) rules that fall under Art. 9 of the Rome I Regulation and have to be applied irrespective of choice-of-law rules, even against the substantive rules specified by Rome I.

2. Directive on the Return of Unlawfully Removed Cultural Objects¹⁷

The second directive we have to examine is Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a MS. The aim of the Directive is to protect national cultural treasures and to specify a mechanism if cultural objects have been taken unlawfully. Types of cultural objects may vary and can include archaeological finds, elements forming an integral part of artistic, historical or religious monuments, pictures and paintings, mosaics or drawings, original posters, sculptures, photographs, films and negatives thereof, incunables (i.e. books as well as artifacts from an early period), manuscripts, early maps and musical scores. The protection also extends to collections and specimens from zoological, botanical, mineralogical or anatomical

13. Case C-381/98. *Ingmar GB Ltd v Eaton Leonard Technologies Inc.* ECR 2000 p. I-09305. Cf. STAUDINGER KOMMENTAR – EINLEITUNG ZU... *supra* note 1 at Rn 37 Bedeutung der *Ingmar* Entscheidung des EuGH; Hendrik L. E. Verhagen, *The Tension Between Party Autonomy and European Union Law: Some Observations on Ingmar GB LTD v Eaton Leonard Technologies Inc.*, INT. A. COMP. L. Q. 135-154 (2002); Giesela Rühl, *Extending Ingmar to jurisdiction and arbitration clauses: the end of party autonomy in contracts with commercial agents?* (OLG München, 17 May 2006 - 7 U 1781/06). 15 EU. REV. O. PR. LAW, (2007); Jonathan Harris, *Mandatory rules and Public Policy under the Rome I Regulation*, in Leible & Ferrari (Eds.), *ROME I... supra* note at 340-341.

14. See Art. 17 and 18 of the Directive.

15. Cf. Hélène Gaudement-Tallon, *Le droit international privé des contrats dans un ensemble régional*, in INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW – ESSAYS IN MEMORY OF PETER E. NYGH, 134-136 (2004).

16. Case C-465/04, *Honyvem Informazioni Commerciali Srl v Mariella De Zotti*. ECR 2006, I-02879.

17. Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. OJ L 74, 1993.3.27, 1.

collections, collections of historical, paleontological, ethnographic or numismatic interest and means of transport more than 75 years old.¹⁸ According to Art. 2 of the Directive, cultural objects unlawfully removed from the territory of a MS shall be (must be) returned. The Directive also describes the specific procedure (filing of action, etc.)

Though the Proposal of Rome I specifically mentions this Directive among its exceptions, if we examine the wording of the Directive, we will note that it does not contain any reference to PIL rules governing contract law – no wonder, since an act of unlawful removal cannot be considered to be a contractual relationship. However, the Directive does contain a handful of PIL provisions. According to these, an arbitration procedure is available to the parties. The burden of proof shall be governed by the legislation of the petitioned MS (i.e. where the object is located).¹⁹ On the other hand, based on Art. 12, ownership of the cultural object after return shall be governed by the laws of the requesting MS.

After taking a closer look, we observe that the PIL links regulated by the Directive don't conflict with those of Rome I, since the material scope of the two regulations is different. Consequently, in our opinion, appraising this Directive was unnecessary in the Proposal.²⁰ Contracts on unlawfully removed treasures may be governed by the Rome I Regulation provided that such contracts are considered valid. The Regulation contains rules on applicable law supporting this option: Art. 10 and 11 on material or formal validity may be considered as such. Still, the law governing the return procedure and the law of ownership after return is regulated by the Directive. Since the Directive evades the question, we make the assumption that the ownership rights law of the petitioned MS is applicable during the period between the illegal removal and subsequent return of the object.²¹

3. Directive on the Posting of Workers²²

Before entering into a detailed exposition of Directive 96/71/EC on the posting on workers, some auxiliary notes regarding the general provisions of the Rome I Regulation for employment contracts are useful. According to Art. 8(1) of the Regulation, the law governing employment contracts is the one chosen by the parties. The choice of law does not allow for depriving the employee of the protection afforded to him by the law that would have been applicable in the absence of a choice of law pursuant to the Regulation.²³ Further, Art. 8(2) stipulates that in the absence of a choice of law, the contract shall be governed by the law of the country in which {.....} or, failing that, from

18 See the Annex of the Directive.

19 See Art. 9 *ibid*.

20 Stefan Leible & Matthias Lehmann, *Die Verordnung...supra* note 1 at 531.

21. The procedural system in such cases is similar to child abduction cases: in general, the main purpose is to reconstitute the earlier legal status and no contrary measures may be approved, regardless of the new owners of the object.

22. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, HL L 18., 1997.1.21., 1.

23. Cf. *Party Autonomy in the Private International Law of Contracts*, in: Eckart Gottschalk & Ralf Michaels & Giesela Rühl & Jan von Hein (Eds.), *CONFLICT OF LAWS IN A GLOBALIZED WORLD* 173(2007).

which the employee habitually carries out his work.²⁴ Where the law applicable cannot be determined in accordance with the above, the contract shall be governed by the law of the country where the employer's business is located. In case it is observed that the contract is more closely connected with a country other than the aforementioned states, the law of that other country shall apply.

Beyond the rules of the Regulation, the Directive sets new provisions concerning the posting of workers in the framework of the free movement of services. The Directive is to be applied to companies located in a MS sending employees to another MS within the scope of providing transnational services. Posting may refer to relocation, employee rental or even posting to a subsidiary or branch office of a parent company.²⁵

The key rules for our focus are to be found in Art. 3 of the Directive, according to which and contrary to Rome I, certain issues are governed by the law of the MS where the work is carried out. In other words, in certain matters the location of the employee's regular workplace or the location of the employer is irrelevant. On these matters the law of the location where work is carried out should be applied. Such matters are: maximal work periods and minimal rest periods, minimal annual paid leave, minimum wages, the conditions of hiring-out of workers, especially in case of staffing agencies, health, safety and hygiene rules at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, protective provisions for young people, equality of treatment between men and women and other articles on non-discrimination.²⁶ These provisions may not be applied if the law set in Rome I or in other rules is more favorable to workers.²⁷

If we compare the rules of Rome I to those of the Directive, we notice that the Directive contains specific rules which in some cases lead to the application of a different country's law than the one set out in the Regulation. In compliance with the Regulation – in the absence of a choice of law by the parties – the employment contract is governed by the law of the employee's regular work location or the employer's location (i.e. the law applicable is based on the permanent factors of the employment relationship). According to the Directive, the contract shall be governed by the law of the temporary workplace (i.e. the temporary factor receives importance). Surprisingly, the law applicable to the permanent workplace may also override the law chosen by the parties.

24. For a detailed explanation see Peter Mankowski, *Europäisches Internationales Arbeitsprozessrecht – Weiteres zum gewöhnlichen Arbeitsort*, IPRAx – PRAX. D. INT. PR. U. VERFAHRENSR. 21-28 (2003); Reinhold Mauer & Susanne Sadtler, *Die Vereinheitlichung des internationalen Arbeitsrechts durch die EG-Verordnung Rom I*, R. D. INT. WIRTSCH. 546. *et seq.* (2008); Conor Quigley, EUROPEAN COMMUNITY CONTRACT LAW, VOLUME 2 EC LEGISLATION, 113-250 (1997); *Employment Contracts*. Cf. Art. 6 Of the Explanatory Memorandum of the Proposal of Rome I Regulation; Case C-125/92. *Mulox IBC Ltd v Hendrick Geels*. ECR 1993., I-4075.; Case C-383/95. *Petrus Wilhelmus Rutten v Cross Medical Ltd*. ECR 1997., I-57.

25. For the background of EU labor law, see Jeff Kenner, *EU EMPLOYMENT LAW: FROM ROME TO AMSTERDAM AND BEYOND* (2003); Philippa Watson, *EU SOCIAL AND EMPLOYMENT LAW: POLICY AND PRACTICE IN AN ENLARGED EUROPE* (2009); For texts of EU and MSs' legislation see Anders Etgen Reitz (Ed.) *LABOR AND EMPLOYMENT LAW IN THE NEW EU MEMBER AND CANDIDATE STATES* (2007).

26. See Article 3(7) of the Directive.

27. See Article 3(1)(a) through (f) of the Directive.

4. Regulation on the Rights of Sea and Inland Waterway Passengers²⁸

Rome I also has special rules applying to contracts for the carriage of passengers and goods in its Art. 5. The Regulation allows choice of law by the parties narrowed to certain states' law. In the absence of such a choice, the "*law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.*"²⁹ If no choice of law was made and it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than the above mentioned, the law of that latter country shall apply.

However, beyond the rules of Rome I, Regulation No 1177/2010/EU (hereinafter referred to as: ("*Regulation on Waterway Transport*") establishes special rules for sea and inland waterway transport. Its main purpose is to ensure non-discrimination between passengers, non-discrimination and assistance for disabled persons, to set out the rights of passengers in case of cancellation or delay, to specify minimal information to be provided to passengers and to require a system for handling complaints. The regulation applies in three cases:

- Firstly, to passengers travelling on passenger services where the port of embarkation is situated in the territory of a MS.
- Secondly, if the service is operated by an EU carrier, to passenger services where the port of embarkation is situated outside the territory of a MS but the port of disembarkation is situated within the territory of a MS.
- Thirdly, on a cruise where the port of embarkation (i.e. the starting point of the cruise) is situated inside the territory of a MS.

In the regulation we find a sentence similar to the earlier – outdated – consumer law directives (see later). It states that "*rights and obligations pursuant to this Regulation shall not be waived or limited, in particular by a derogation or restrictive clause in the transport contract.*" In our opinion this is also valid when the parties elect to choose the law of a third state.

It follows easily that the application of Rome I and the Regulation on Waterway Transport may drive us to use differing substantive rules in certain cases. For instance, even if a third state's law has to be applied to carriage according to Rome I, the provisions of the Directive on Waterway Transport must still be applied. Consequently, the rules of the latter overwrite the third state's laws before the courts of MSs.

28. Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 Text with EEA relevance, OJ L 334, 17.12.2010, 1.

29. Art. 5(2) Rome I Regulation. Initially, this solution may be problematic in cases when passengers pass a border to travel.

5. Regulation on the Liability of Carriers of Passengers by Sea³⁰

Regulation No 392/2009/EC also has some rules that may have an effect on the law applicable to contracts, even if the relationship governed by the Regulation itself is to be interpreted as a non-contractual obligation arising out of a contract. The Regulation must be applied if two circumstances are met:

- Firstly, when a dispute involves both international and domestic carriage. Carriage is considered international if, according to the contract of carriage, the place of departure and the place of destination are situated in two different States, or even in a single State if there is an intermediate port of call in another State.
- Secondly, there must exist a connection with the EU: either the ship has to fly the flag of or must be registered in a MS, or the contract of carriage must have been signed in a MS, or the place of departure or destination must be in a MS.

Regarding the carrier's responsibility, the Regulation refers to the International Convention on Limitation of Liability for Maritime Claims of 1976³¹ and its implementation into national laws. In the absence of any applicable national legislation, it states that only Art. 3 of this Regulation shall govern the liability of the carrier. Art. 3 refers to parts of the Regulation and to the Convention. Consequently, in respect of claims for loss of life or personal injury to a passenger, the rules of the above-mentioned Convention are to be applied. Art. 3 of said Convention sets strict rules for carriers, Art. 7 specifies liability for death and personal injury and Art. 8 limits liability for loss of or damage to luggage and vehicles.

The rules of the Regulation and the Agreement have to be applied even if a choice of law has been made. This may limit the scope of, or more precisely, alter the usage of the substantive law designated by Art. 5 of Rome I.

B. Consumer Law Legislation

1. Provisions of the Rome I Regulation on Consumer Contracts³²

Beside the substantive law background,³³ the question of which law to apply to international consumer contracts has great relevance: according to statistics, the

30. Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents (Text with EEA relevance) OJ L 131, 28.5.2009, 24.

31. See the Annex of Regulation 392/2009/EC.

32. For an overview see Jonathan Hill, CROSS-BORDER CONSUMER CONTRACTS, 321-346 *esp. at* 321-329 (2008).

33. For the European consumer law background, there can be found numerous comprehensive and extensive publications, see e. g. Paolisa Nebbia & Tony Askham Richmond (Ed.), EU CONSUMER LAW (2004); Stephen Weatherill, EU CONSUMER LAW AND POLICY (2005); Hans-W. Micklitz & Norbert Reich &

frequency of occurrence of choice of law clauses on European international business (e-trade) websites is between 30-40%.³⁴ Before we discuss the relevant provisions of directive law, it is important to briefly review the rules of Rome I on consumer contracts; more thorough analyses of these provisions can be found in numerous international publications.³⁵

The rules on consumer protection in the Regulation are specific provisions in contrast to the general rules of Articles 3 and 4. Therefore, they create exceptions from the general rules. There are two important necessary conditions for such contracts to fall under Art. 6:

- The contract between the professional and the consumer has to fall under the material scope of consumer contracts, and also
- The activity of the professional must be directed to the MS where the consumer has his/her habitual residence.

The material scope of consumer contracts is drawn wider than in the Rome Convention,³⁶ where Art. 5 applies its consumer rules only to the supply of goods or services. Fortunately, Art. 6 of Rome I departs from that disputed solution and defines a broader scope for consumer contracts. According to the Regulation, a consumer contract is a contract concluded by a natural person for a purpose that can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional).³⁷ Based on the Regulation, the contract between them may even be concluded and executed via the Internet.³⁸ The law applicable to contracts for downloading software, music and films from the web is generally the law of the country where the consumer has his/her habitual residence, if that is the location of the download process and if the site includes a request to conclude a contract.³⁹ A passive website, through which concluding a contract is not possible, cannot be considered to be

Peter Rott (Eds.), UNDERSTANDING EU CONSUMER LAW (2009); Hans Schulte-Nölke & Christian Twigg-Flesner & Martin Ebers (Eds.), EC CONSUMER LAW COMPENDIUM: THE CONSUMER ACQUIS AND ITS TRANSPOSITION IN THE MEMBER STATES. (2008); Reiner Schulze & Hans Schulte-Nölke & Jackie M. Jones (Eds.), A CASEBOOK ON EUROPEAN CONSUMER LAW (2008).

34. CROSS-BORDER CONSUMER CONTRACTS, *supra* note 1 at 327-328.

35. Eva-Maria Kieninger, *Der grenzüberschreitende Verbrauchervertrag zwischen Richtlinienkollisionsrecht und Rom I-Verordnung – Nach der Reform ist vor der Reform*, in Dietmar Baetge & Jan von Hein & Michael von Hinden (Hrsg.), DIE RICHTIGE ORDNUNG – FESTSCHRIFT FÜR JAN KROPHOLLER ZUM 70. GEBURTSTAG 499-515 (2008); Dieter Martiny, 5. Teil – Einzelne Vertragstypen – Verträge mit Verbrauchern, in INTERNATIONALES VERTRAGSRECHT... *supra* note 1 at 1245-1316; Francesca Ragno, *The Law Applicable to Consumer Contracts under the Rome I Regulation*, in ROME I. ... *supra* note 1 at 129-170; Norbert Reich, *Legal Protection of Individual and Collective Consumer Interests*, in UNDERSTANDING EU CONSUMER LAW *supra* note 1 at 263-315.

36. Paul Lagarde, *Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles (Rome I)*, 95 REV. CRIT. D. DR. INT. PR. 333-334 (2006).

37. See Art. 7 of the Regulation.

38. Albert Venn Dicey & John Humphrey Carlile Morris & Lawrence Collins, THE CONFLICT OF LAW, FOURTH CUMULATIVE SUPPLEMENT TO THE FOURTEENTH EDITION, 393-394 (2011); Leible & Lehmann, *Die Verordnung*... *supra* note 1 at 537.

39. Lorna E Gillies, ELECTRONIC COMMERCE AND INTERNATIONAL PRIVATE LAW, 141 (2008) Leible & Lehmann, *Die Verordnung*... *supra* note 1 at 537.

activity in that country.⁴⁰ Moreover, contracts of carriage and contracts offering a service outside the state of the consumer's habitual residence don't fall under the scope of consumer contracts. Neither do contracts on real estate, on rights embodied by financial instruments or securities, and – as detailed in the general provisions – contracts concluded in a multilateral system.

As a general rule, the law applied to consumer contracts is the one chosen by the parties. However, similar to employment contracts, stipulation of law by the parties does not exclude the application of substantive national laws that would protect the consumer in the absence of such stipulation.⁴¹ If the professional pursues his commercial or professional activities in the country where the consumer has his habitual residence, or directs such activities – whether exclusively or not – to that country, the contract shall be governed by the law of the country where the consumer has his habitual residence. If the professional activities are not performed in the country where the consumer has his habitual residence, the law applicable will be determined by the general provisions, i.e. the rules of Art. 3 and 4. Even though we will not attempt a detailed analysis of said articles here, it is important to note that resulting from them, the law applicable in most cases will be the law of the professional's habitual residence. In such cases, the consumer will likely not be familiar with the regulations designed to ensure his/her protection.

40. Pfeiffer, *Neues Internationales...* *supra* note 1 at 627.; Ragno: *The Law Applicable to Consumer...* *supra* note 1 at 147.

41 However, it is important to mention that in legal practice, in most cases the law of the professional's residence is applied, even if the professional has an activity in the homeland of the foreign customer. For example, if a Hungarian temporary resident in Germany visits a German (multinational) phone company and contracts for a mobile phone, in most of the cases German law will be applied because of the parties stipulation forced by the company. Such choice-of-law is sometimes *expressis verbis* uttered in the contract, or (without reference that it would be a choice-of-law) the parties simply use German (substantive law) conditions in their contract. In the viewpoint of PIL, latter can be considered an incorporation of foreign law. However, in theory, according to Rome I, neither of these two solutions is allowed to harm the consumer's rights that he would have based on the law of his/her permanent residency: in our example, Hungarian law. Since the substantive provisions of the MSs are different, that is why we believe there may exist millions of contracts in which the customer's rights are harmed, and the parties use an "improper choice of law" for their contract.

Moreover, the situation is similar in regard to third states (non-MSs). If a company from a third state maintains a website and contracts can be concluded through the website, the habitual residence of the consumer will likely have relevance. If someone concludes a consumer contract with a New York based company and buys goods from New York via the Internet, the contract may be a consumer contract according to Art. 6 of Rome I, and the general rules of Art. 4 of the Regulation [*esp.* Art. 4(1)a] cannot be applied. Of course, in order to reach this conclusion, the term "directed activity" has to be interpreted (targeted activity test) considering all circumstances of the case. However, in our opinion the text and background of the Rome I Regulation would lead to the determination of this fact since the territorial conditions are present in the country of the consumer. According to Art. 6(2) of the Regulation, if the parties decide to choose New York law, they may not lower the level of consumer protection as it is set in the laws of the country of the consumer's habitual residence. In this case, the New York company could hardly imagine that European rules may have relevance, and (in our opinion) the consumer also wouldn't likely be aware of this fact. On the other hand, please note that if the consumer were to rent an apartment in New York, the contract would not be treated as a consumer contract, since service contracts where the services are to be supplied in a country other than the consumer's habitual residence do not fall under the material scope of Art. 6 of Rome I [Art. 6(4)a]. For a deep analysis *cf.* Gralf-Peter Callies, *Consumer Contracts*, in Callies (Ed.), *ROME REGULATIONS...* *supra* note 1 at 124-155, *esp.* 143-145. For a comparison to US rules, see Healy, *Consumer Protection...* *supra* note 1 at 536-546; Giesela Rühl... *supra* note 1 at 155-171 (2007).

2. Methods Applied in Consumer Law Directives

The first directives on consumer law did not contain rules on their applicability.⁴² Neither did the Directive on Product Liability,⁴³ the Doorstep Selling Directive,⁴⁴ nor the Directive on Unfair Terms in Consumer Contracts.^{45 46} Therefore the scope of these directives was determined by the implementing MSs.⁴⁷ Another problematic issue was that some of these rules did not contain explicit conflict of laws provisions either. Later, other regulations applied varying methods and the directives' subject and scope became better defined.

In all sources, both early ones and those adopted later, PIL or rules that have an effect on PIL appear as a level above regular PIL provisions, creating a kind of supra-PIL, restricting the parties' rights to choice-of-law or – in certain cases – even the law applicable in the absence of choice made by the parties. We may perceive in these provisions a kind of anti-foreign law mentality: most of them were enacted to protect the consumer from a third state's law.⁴⁸ There are several approaches used in such legislation.

Firstly, in certain instances it is emphasized that the consumer may not waive the rights conferred on him by the directive. This phrase has an effect on the choice of law made by the parties and on the law applicable in the absence of choice as well.

In the second case, as long as the consumer contract falls within the scope of the directives and has a close connection to the EU or one or more of its MSs, the MSs have to ensure that the consumer does not lose the protection granted by the directives by virtue of the choice of the law of a non-member country. As seen in these cases, a close connection is enough to apply the rules of the EU and their national implementations. Thus, not all of the relevant elements have to fall within the territory of EU. In some of these rules, there is no explicit provision for what we should do in the absence of a choice of law.

42. Marc Fallon & Stéphanie Francq, *Towards Internationally Mandatory Directives for Consumer Contracts?* in Jurgen Basedow & Isaak Meier & Daniel Girsberger & Talia Einhorn & Anton K. Schnyde (Eds.), *PRIVATE INTERNATIONAL LAW IN THE INTERNATIONAL ARENA – LIBER AMICORUM KURT SIEHR*, 158 (2000). Vékás, *Der Weg...supra* note 1 at 174-175.

43. Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. OJ L 210, 7.8.1985, 29.

44. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises. OJ L 372, 31.12.1985, 31.

45. Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit. OJ L 42, 12.2.1987, 48.

46. For the problems this method caused, see Bernd von Hoffmann, *Richtlinien der EG und Internationales Privatrecht*, 35 ZEITSCHR. F. EUROPAR., INT. PRIVATR. U. RECHTSVERGL. 51-54 (1995).

47. Fallon & Francq, *Towards Internationally Mandatory...* note 1 at 158.

48. David Lefranc, *La spécificité des règles de conflit de lois en droit communautaire dérivé (aspects de droit privé)*, REV. CRIT. D. DR. INT. PR. 425-426 (2005).

In the third instance, all aspects of the relevant situation at the time of the choice of law must be located in one or more MSs and the contract must also fall under the scope of the directive. Thus, in these cases, all elements of the contract have to be related to the EU in order to provide protection to the consumer. Usually, this protection is given against a choice of law by the parties. In the absence of this, just as in some of the above-mentioned cases, not all directives provide clear guidance on whether the rules of the directives should be applied or not.

Finally, the simplest and most elegant approach used was to explicitly vest these provisions with an imperative, internationally mandatory character in the presence of certain elements (e.g. real estate located in the EU).

There are numerous approaches used in the provisions of consumer law directives. If we consider them to be imperative (overriding mandatory) regulations, their implementation has to be applied even in the absence of choice of law and their rules can be seen as provisions falling under Art. 9 of Rome I (overriding mandatory provisions). According to certain authors,⁴⁹ this seems to be affirmed by the aforementioned *Ingmar* judgment of the ECJ. However, we have doubts about whether this interpretation of imperative – internationally mandatory – provisions would hold true for all the directives, since we share the view that “the mere fact that a rule serves to protect the interest of the weaker party to the contract does not attribute overriding effect to such a rule.”⁵⁰ Still, we certainly agree that many EU consumer provisions as implemented have the attributes of overriding mandatory rules in the sense of Art 9 of Rome I. We will now proceed to discuss the relevant rules in chronological order.

3. Product Liability Directive⁵¹

Since Directive 85/374/EEC is about product liability, which is a non-contractual obligation and falls within the scope of the Rome II Regulation,⁵² we only recap its relevant provisions that may also have an effect to contract conclusion. As is well known, this directive is one of the main sources in the EU of product liability and sets the substantive fundamental rules (minimal requirements) for the liability of producers and manufacturers.

Art. 12 of the Directive states that the producer’s liability may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability. In our opinion, this rule is also applicable if we apply the laws of a third country before the court of a MS. The rule is binding when a choice of law is stipulated and also to the law applicable in the absence of choice-of-law.

A conflict between the law chosen by the Rome I Regulation and that by the Directive may occur if the law allows the limitation or exclusion of the producer’s

49. Plender & Wilderspin, *THE EUROPEAN... supra* note 1 at 164; Norbert Reich & Hans-W., Micklitz, *EU. VERBRAUCHERR.* 474, 480, 482 (2003).

50. Verhagen, *The Tension Between... supra* note 1 at 145. *Cf. id. at* 148, 151 (2002).

51. See note 1.

52. See Art. 5 Rome II Regulation.

liability: such a clause inserted into a contract in the EU is ineffectual and cannot be defended before European courts.⁵³

4. Doorstep Selling Directive⁵⁴

Directive 85/577/EEC protects the consumer in contracts negotiated away from business premises – or more precisely, will protect them until it is repealed by the new Directive on consumer rights (see next section). Its most important provision is the securing of cancellation rights for consumers (which shall be at least seven days long, and still varies among MSs).⁵⁵

The Directive lays down only a few rules that effect PIL. Similarly to the Product Liability Directive, Art. 6 states that the consumer may not waive the rights conferred on him by the Directive. Accordingly, the rights of consumers (including the right of cancellation) may not be limited or waived in a contract. In our opinion, this also stands in the case of applying a third state's law. Furthermore, the Directive also lays down an auxiliary rule which is more muddling than useful. Based on its Art. 7, "*if the consumer exercises his right of renunciation, the legal effects of such renunciation shall be governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received.*" Of course, this rule has to be interpreted in the context of Art. 6 detailed above.

It is important to mention that some of the well-known Gran Canaria cases were also in connection with this Directive, while other disputes occurred concerning the application of the Timeshare directive (see below). In all cases, the problems arose because Spain had not implemented the Directive by the time Germany was done with the implementation. In the first group of cases related to the Doorstep selling directive, German tourists on the Spanish island of Gran Canaria were the victims of a German company manufacturing bed linen. The German company had an agreement with a local Spanish company that organized free bus excursions. During the trip, the Spanish company gave the tourists a sales contract, which they signed without paying anything. After returning to Germany, some of these tourists wanted to exert their right of withdrawal under German law, enacted under the Directive. According to Spanish law, there was no withdrawal period available. In the end of the procedures, the German courts have refused the protection of the consumers and found the choice of law clause to be valid.

If we compare the rules of the Directive and those of Rome I, we may state with certainty that if Rome I were to not designate the law of a MS, the Directive itself may be still applied. Hence, the Directive is able to change the substantive applicable rules. Of

53. von Hoffmann, *Richtlinien der EG...* *supra* note 1 at 50; Lando, *The EEC Convention...* *supra* note 1 at 181.

54. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises. OJ L 372, 31.12.1985, 31.

55. For the length of withdrawal periods see Schulte-Nölke & Twigg-Flesner & Ebers, EC CONSUMER LAW COMPENDIUM... *supra* note at 98 (2008). For a comparative analysis of lengths of periods for other Directives see *id.* at 79-451.

course, this solution does not conform to the rules of Rome I; nevertheless, it may advantage consumers.

5. Directive on Unfair Terms in Consumer Contracts⁵⁶

One of the first – second-generation – directives governing PIL alongside consumer protection was Directive 93/13/EEC on unfair terms in contracts. Its purpose was to approximate the rules of MSs on unfair terms in contracts concluded between a seller (or supplier) and a consumer. The Directive focuses on contractual terms lacking individual negotiation and defines the concept of unfairness and related legal consequences, sanctions and compensatory redress. A contractual term shall be regarded as unfair if, contrary to the requirement of good faith, it causes significant imbalance in the parties' rights and obligations to the detriment of the consumer. The Directive governs only unfair terms in contracts. In this regard it shall be considered as special legislation beyond the fundamental rules of Rome I.

If examined closer, the Directive turns out to contain a special PIL rule in Art. 6(2). It states that:

“Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.”

The rule above is a unilateral choice-of-law rule for consumer protection: here, the Community is trying to protect consumers. The consumer shall not lose the protection of EU law by virtue of a choice of a non-MS's law. Even though it places the stipulation of laws within definite bounds, the Directive does not include provisions for the case where no choice of law is made by the parties.⁵⁷ In such cases, general PIL provisions shall apply⁵⁸ and the consumer can only be protected if a court finds that the applicable third country law would harm imperative MS provisions including transcribed measures of EU directive law.⁵⁹

The relationship and differences between this rule and Rome I are quite complex. We have to examine several provisions, namely Art. 3 (4), Art. 6(2) and Art. 9 of Rome I.

Firstly, Art. 3(4) of the Regulation (the so called “internal market clause”) says:

56. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. HL L 95., 1993.4.21., 29.

57. Erik Jayme, *Klauselrichtlinie und Internationales Privatrecht – Eine Skizze in LEBENDIGES RECHT – VON DEN SUMEREN BIS ZUR GEGENWART*, FESTSCHRIFT FÜR REINHOLD TINKNER ZUM 65. GEBURTSTAG, 577-578 (1995).

58. Cf. Art 6(1) of the Directive: “Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.” However, in our opinion, this provision lacks the attributes required for having a direct effect.

59. See Art. 9 Rome I Regulation.

“Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.”

This rule applies only in cases of a choice of law having been made by the parties. The Rome I Regulation orders all mandatory provisions to be applied, while the Directive focuses only on matters that fall under its scope. However, the main difference between the internal market clause and the provision of the Directive is that for applicability of the internal market provision of the Regulation, all relevant elements have to be within the MSs.

Secondly, we have to examine the relationship between the rules of the Directive with Article 6(2) of Rome I. The Regulation declares with respect to consumer contracts that:

“A choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable.”

This rule differs in several aspects from the solution used in the Directive. It implies the use of national law instead of EU law or EU instruments and does not prescribe a close relationship with a MS.

Thirdly, the rules on mandatory provisions found in Art. 9 of the Regulation may also have importance. Recall that overriding mandatory provisions are provisions which are regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization. Thus, they are applicable irrespective of the law otherwise applicable to the contract under the Regulation. The first rule on mandatory provisions in the Regulation allows the forum to use its overriding mandatory provisions [Article 9(2)]. The second rule allows the forum to consider the usage of the mandatory provisions of another country where the obligations arising out of the contract have to be or have been performed. Such provisions may only be adverted in so far as they render the performance of the contract unlawful [Regulation, Article 9(3)]. Here, the Regulation refers only to rules with major importance. These rules have international mandatory effect, and they are applied regardless of a choice of law. Moreover, they must also be applied in the absence of a choice of law clause. Furthermore, the Regulation refers solely to national rules, not those (either generally or specifically), of the EU.

In summary, again we have found that the application of the Directive may lead to a different law (or, more precisely, to the usage of different provisions) than that set out in Rome I. It is also important to mention, that – as indicated before – no written guidance is provided as to what should be done in case the parties elected not nominate any law as the proper law for their contract when the applicable rules of the third country would harm consumers' rights set out in the Directive. Nevertheless, we can certainly state that such clauses cannot be applied, since the mandatory system of the MS would not permit them to be used.

6. Directive on Distance Selling⁶⁰

Directive 97/7/EEC on the minimal requirements for distance contracts also contains choice-of-law regulations. It is important to mention that after the adoption of the Directive on Consumer Rights (see next section), the Distance Selling Directive will also be repealed (see later). The aim of the Distance Selling Directive was to approximate the legal standards of MSs for distance contracts (contracts that make exclusive use of one or more means of distance communication) between consumers and suppliers. Those means include unaddressed printed matters, addressed printed matters, standard letters, press advertising with order forms, catalogues, phone calls, radio, email, fax and television (teleshopping). The Directive sets out the circumstances of the trade: it defines the criteria for mandatory prior information to be given, the scope of information, the conditions and time limit for exercising the right of withdrawal, the scope for inertia selling, manners of redress for the consumer, addressing of complaints, etc.

Art. 12 of the Directive asserts that

“1. The consumer may not waive the rights conferred on him by the transposition of this Directive into national law.

2. Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has close connection with the territory of one or more Member States.”

As we can see, similarly to the above-mentioned rules, the Directive includes limitations only in regard to its applicability: the consumer stays protected and cannot lose the protection. This solution is similar to the earlier methods we have seen.

The provisions of the directive – again similarly to others mentioned above – differ from those of Rome I and may lead to ^apartial or complete) differences in application.

7. Directive on the Sale of Consumer Goods⁶¹

Directive 1999/44/EEC on the sale of goods to consumers is certainly one of the most important pieces of EU legislation adopted in the field of consumer law, since it

60. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. HL L 144., 1997.6.4., 19. For its general background and rules see Karl von Rumohr, GRENZENÜBERGREIFENDE FERNABSATZVERTRÄGE IM INTERNATIONALEN PRIVATRECHT (2006).

61. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees HL L 171., 1999.7.7., 12. Cf. Ulrich Magnus, *Consumer sales and associated guarantees*, in Christian Twigg-Flesner (Ed.), EUROPEAN UNION PRIVATE LAW 243-256 (2010); Dirk Staudenmayer, *The Directive on the Sale of Consumer Goods and Associated Guarantees – a Milestone in European Consumer and Private Law*, in 8 EU. REV. O. PR. L. 547-564 (2000); Strefan Grundmann & Cesare Massimo Bianca (eds.), EU KAUFRECHTS-RICHTLINIE – KOMMENTAR (2002).

“concerns one of the core areas of every private law.”⁶² The purpose of its adoption was to harmonize the rules of the MSs on the sale of consumer goods by ensuring a uniform minimum set of fair rules governing such relationships. In the interpretation of the Directive, consumer goods shall mean any tangible movable item with a narrow scope of exceptions. Among others, even sales at auction or electronic sales such as those on eBay are covered.⁶³ The Directive regulates the responsibility of the seller and the rights of the buyer, the minimum criteria for conformity in the contract, the rights and sanctions for the consumer, the reasonable time frame for legal remedies, as well as the required content for warranties offered by the seller.

Art. 7 of the Directive sets out a choice of law similar to that of above-mentioned directives:

“1. Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer.

...

2. Member States shall take the necessary measures to ensure that consumers are not deprived of the protection afforded by this Directive as a result of opting for the law of a non-member State as the law applicable to the contract where the contract has a close connection with the territory of the Member States.”

According to Art. 7, we discover that after notifying the seller of a lack of conformity in the contract, it is permitted to reduce the consumer's rights below the protection level set by the Directive.⁶⁴ On the other hand, if there is a close connection between the contractual relationship and the territory of the EU, the parties do not have the right to lower the level of protection below that of the Directive, not even through the technique of choosing a non-MS's law. Consequently, these provisions are binding in situations with or without the existence of choice of law. Nevertheless, the second sentence of Art. 7(1) permits an exception: in the case of second-hand goods, MSs may allow seller and consumer to agree on contractual terms which contain a shorter time period for the liability of the seller than that set down in the Directive. However, such a period may not be less than one year. The motivation behind this phrasing is that in the case of second-hand goods, the quality of wares is not easy to prove.⁶⁵

There is nothing new to say about the relationship between the Directive and the Rome I Regulation compared to what was noted for earlier directives: the two systems differ. According to Rome I, the law of the buyer's habitual residence would be applicable. If this law is the law of a third state, the Directive automatically kicks in to protect the consumer. The rules of the Directive can be considered imperative rules

62. Staudenmayer, *The Directive*... *supra* note 1 at 547.

63. Magnus, *Consumer*... *supra* note 1 at 247.

64. Staudenmayer, *The Directive*... *supra* note 1 at 560.

65. Staudenmayer, *The Directive*... *supra* note 1 at 561.

(overriding mandatory provisions) in the sense of Art. 9 of Rome I, provided they are properly implemented into the MS's law.

8. Directive on E-Commerce⁶⁶

The next interesting piece of legislation to have been adopted was the Directive on the legal aspects of e-commerce. Since the problem in this Directive is not a classical conflict-of-laws question and there are numerous publications available providing deeper analysis,⁶⁷ we will only briefly discuss its provisions. As is well known, the Directive contains the principal rules for contracts concluded in the EU in an electronic fashion. According to the clarification, the term "electronic" means that the service request is initially sent and received at its destination by means of electronic equipment for the processing and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means, which also includes the Internet. There are rules on information requirements, conclusion of contracts, remedies and dispute settlement.

From a PIL point of view, the most debated part of the Directive is the one declaring the usage of the country-of-origin principle (*Herkunftslandprinzip*). It is important to note that besides several articles of the Treaty on the Functioning of the European Union having an equivalent effect,⁶⁸ some sources of secondary legislation⁶⁹

66. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). OJ L 178, 17.7.2000, 1.

67. Since the country of origin principle and its effect is uncertain and the subject of debate, there are numerous authors who have dealt with this interesting question: see Martina Blasi, *DAS HERKUNFTSLANDPRINZIP DER FERNSEH- UND DER E-COMMERCE-RICHTLINIE* (2004); Marc Fallon & Johan Meeusen, *Le commerce électronique, la directive 2000/31/CE et le droit international privé*, REV. CR. D. DR. INT. PR. 435-490 (2002); Lorna E. Gillies, *Choice of Law Rules in the Law Applicable for Electronic Consumer Contracts: Replacement of the Rome Convention by the Rome I Regulation*, J. O. PR. INT. LAW (89-112) 2007; Lorna E. Gillies, *ELECTRONIC COMMERCE AND INTERNATIONAL PRIVATE LAW* (2008); Michael Hellner, *E-Commerce Directive and Private International Law*, in Andrea Schulz, (Ed.) *LEGAL ASPECTS OF AN E-COMMERCE TRANSACTION* 107-122. (2006); Stefan Leible, *Das Herkunftslandprinzip im IPR – Fata Morgana oder neue Metaregel?* in Annette Nordhausen (Hrsg.), *NEUE ENTWICKLUNGEN IN DER DIENSTLEISTUNGS- UND WARENVERKEHRSFREIHEIT* (2002); Peter Mankowski, *Das Herkunftslandprinzip als Internationales Privatrecht der e-commerce-Richtlinie*, ZEITSCHR. F. VERGL. RECHTSWISS. 137-181 2001; Peter Mankowski, *Herkunftslandprinzip und deutsches Umsetzungsgesetz zur e-commerce-Richtlinie*, IPRax PRAX. D. INT. PR. U. VERFAHRENSR. 257-265 (2002); Ralf Michaels, *EU Law as Private International Law? Re-Conceptualising the Country-of-Origin Principle as Vested Rights Theory*, in DUKE LAW FACULTY SCHOLARSHIP. PAPER 1573. (2006), http://scholarship.law.duke.edu/faculty_scholarship/1573 (Sept 30., 2011); Nina Hönig, *The European Directive on e-Commerce (2000/31/EC) and its Consequences on the Conflict of Laws*, GLOBAL JURIST TOPICS 2005, <http://www.bepress.com/gj/topics>; Sophia Tang, *ELECTRONIC CONSUMER CONTRACTS IN THE CONFLICT OF LAWS*, (2009), Sophia Tang, *Parties' Choice of Law in E-Consumer Contracts*, J. O. PR. INT. LAW 113-136 (2007).

68. See the articles on the inner market – Four Freedoms, Consolidated Version of the Treaty on the Functioning of the European Union. OJ C 83, 30.03.2010, 47. Cf. Stefan Grundmann, *Binnenmarktkollisionsrecht – vom klassischen IPR zur Integrationsordnung*, RABELS ZEITSCHR. F. AUSL. U. INT. PRIVATR. 458-477 (2000).; Michaels, *The New European...* *supra* note 1 at 1625 *et seq.*

also contain similar rules. However, since this issue is closely related to the regulation of the inner market,⁷⁰ we hereby only wish to briefly review the rules of the E-commerce Directive. Its – very awkwardly formulated – Art. 3 states that:

“1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.”

However, Art. 1(4) of the Directive declares that the Directive does not establish additional rules on private international law. Similarly, Recital (23) of the Preamble says that:

“This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.”

Additionally, Recital (55) of the Preamble is also interesting. It states that:

“This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence.”

We agree with the view that the statement “the Directive... (does not) aim to establish additional rules on private international law relating to conflicts of law” is misleading, since the provisions of the Directive have powerful effects on PIL.⁷¹ Luckily, regarding contracts and consumer protection, the Annex of the Directive contains some important and very useful provisions. It says that the above mentioned Art. 3 does not apply to the freedom of the parties to choose the law applicable to their contract, or to contractual obligations concerning consumer contacts. As a result, the law chosen based on Rome I regulation cannot be modified.

69. E.g. Art. 2 and 23 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities. OJ L 298, 17.10.1989, 23.

70. Basedow, *Europäisches...* *supra* note 1 at 1927-1928.

71. Mankowski, *Das Herkunftslandprinzip...* *supra* note 1 at 179-181.; Michaels, *The New European...* *supra* note 1 at 1628 *et seq.*

9. Directive on Distance Marketing of Consumer Financial Services⁷²

The aim of Directive 2002/65/EEC is to approximate the laws of the MSs for the distance marketing of consumer financial services (meaning any service of a banking, credit, insurance, personal pension, investment or payment nature). Thus, the directive focuses on a narrow segment within consumer services provided at distance, namely financial services. It deals with issues such as providing information to the consumer, legal remedies, practicing the right of withdrawal, payment for the service given before withdrawal, unsolicited services and communications, sanctions and judicial redress.

Art. 12 of the Directive has a similar phrase as detailed above in other directives. It states that Consumers may not waive the rights conferred on them by the Directive. Moreover, according Art. 12(2) Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by the Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract, if this contract has a close link with the territory of one or more Member States.

In its essence, this structure is similar to the others detailed above. Consequently, its relation to Rome I is also similar to those. Yet, in certain MSs the imperative character of the Directive's provisions is not recognized by the courts to its full extent.⁷³

10. Timeshare Directive⁷⁴

One of the latest examples of relevant consumer law legislation is Directive 2008/122/EC on timeshare, long-term holiday product, resale and exchange contracts (hereinafter referred to as: "*New Timeshare Directive*" or "*Directive*"). The New Timeshare Directive has replaced the former Directive 94/47/EC on aspects of contracts relating to the purchase of the right to use real estate properties (hereinafter referred to as: "*Former Timeshare Directive*")⁷⁵ as of February 2011. Some of the most cited cases of EU PIL – a part of the infamous Gran Canaria cases – have also involved the Former Timeshare Directive: as mentioned before, in these cases problems arose because of the failure of Spain to implement the rules of the Directive into its national legislation. The first group of such cases related to the Doorstep selling directive (see the earlier). In the second set of cases, German consumers travelling in the Canary Islands signed contracts for the purchase of timeshares in holiday apartments. The contracts – some subject to the law of the Isle of Man, others to Spanish law – contained a non-withdrawal clause although withdrawal was possible in German law and also in Community law. The question was

72. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC. OJ L 271, 2002.10.9. 16.

73. Jan-Jaap Kuipers & Sara Migliorini, *Qu'est-ce que sont les 'lois de police'?* EUR. REV. O. PR. LAW 193 (2011).

74. Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (Text with EEA relevance). OJ L 33, 3.2.2009, 10.

75. Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. OJ L 280., 29.10.1994, 83.

whether the consumers could rely on German law against the law chosen. However, the German Federal Court ruled out any attempt to justify the application of the protective German law, even as a mandatory rule of the forum within the scope of Article 7 of the Rome Convention, a Convention which was applicable at the time the cases arose.⁷⁶

Similarly to the earlier timeshare rules, the aim of the New Timeshare Directive is to approximate the minimal standards of timeshare contracts and of contracts for long-term holiday products. Among others, it specifies the attributes of mandatory information to be supplied to the buyer, the components of the contract, the rights of the buyer and conditions of the right of withdrawal.⁷⁷

However, there is something novel in this Directive that we haven't encountered in other directives. Art. 12 is called "*Imperative nature of the Directive and application in international cases.*" This title clears up perfectly any questions arising out of the Directive's usage. The rules have an imperative, internationally mandatory character: they have to be applied both in the presence or absence of choice of law. In Art. 12(1), the Directive lays down that:

"Member States shall ensure that, where the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by this Directive."

Beyond its substantive law effects, this provision has – just as Art. 9 of the Former Timeshare Directive does – an effect on the law applicable in the absence of choice of law and of course it also limits the scope of the parties' choice of law.

Furthermore, there's another rule in Art. 12(2) that may be of importance. The directive states that:

"Where the applicable law is that of a third country, consumers shall not be deprived of the protection granted by this Directive, as implemented in the Member State of the forum..."

According to the Directive, this can happen in two cases:

- If any of the real estate properties concerned is situated within the territory of a MS, or
- In the case of a contract not directly related to real estate, if the trader pursues commercial or professional activities in a MS or directs such activities to a MS.

76. See the judgement BGH, 19.03.1997. For citations and background see Stéphanie Francq, The Scope of Secondary Community Law in the Light of the Methods of Private International Law – Or the Other Way Around?, in Andrea Bonomi, Petar Sarcevic, Paul Volken (Eds.), *YEARBOOK OF PRIVATE INTERNATIONAL LAW* 339 et seq., esp. footnote 22 (2006).

77. Our short summary about the Gran Canaria cases was based on Recital (61) of the Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization. COM(2002)0654 final.

A good question is what to do if the directive is not implemented in the law of a MS and the rights of the consumer would be harmed if a third-state's law were applied. In this area, Art. 12 of the directive will need further interpretation. However, we find the expression "*as implemented in the Member State*" especially problematic, since it suggests that without implementation, no protective provisions need to be applied.

Comparing the system of the Rome I Regulation and the Directive, we note significant differences. The provisions on consumer contracts of the Regulation do not allow the non-application of the law that would apply in the absence of choice of law of the parties if the habitual residence of the buyer (tenant) is the same as the place of activity of the professional (landlord). If they differ, the law applicable is governed by the general rules of the Regulation. As Article 4(c) of the Regulation states:

"A contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated."

Article 4(d) creates an exception for this rule, pronouncing that:

"A tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country."

The provisions of the Directive play a role above (i.e. contrary to) latter rules of the Regulation if the real estate property is located within the EU. Consequently, there are different choices of law principles applied in the two pieces of legislation:

- The habitual residence of the consumer – Art. 6(1) Rome I
- The country where the property is situated – Art. 4(c) Rome I: if the contract does not fulfill the criteria set by the Regulation for consumer contracts
- The habitual residence of the landlord – Art. 4(d) Rome I: under certain conditions
- EU law (as transcribed into a MS's law) – Art. 12 New Timeshare Directive: contrary to the above-mentioned rules, before a MS's courts, if a non-MS's law would provide a lower level of protection.

We can observe that the protection of consumers is better formulated than in the Former Timeshare Directive, but it still "fades" at a certain point. If the habitual residence of the consumer differs from that of the professional and if the real estate property lies outside the EU, the parties may choose, without restriction, any law for timeshare contracts. Unfortunately, neither the Regulation nor the Directive protects consumers in such a case. The situation is the same even if the consumer is a citizen of a MS. In these cases, the consumer may only be protected if the contract is not directly related to real estate property and the trader pursues commercial or professional activities in the EU.

11. Directive on Unfair Commercial Practices⁷⁸

The next directive of interest to us is Directive 2005/29/EC on Unfair Commercial Practices. This Directive was adopted in order to harmonize rules for unfair commercial practices that harm consumers' economic interests. According to Art. 3(1), it shall apply to unfair business-to-consumer commercial practices before, during and after a commercial transaction in relation to a product. A commercial practice shall be unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behavior with regard to the product of the average consumer whom it reaches or to whom it is addressed.

The Directive – unlike its Proposal⁷⁹ – does not contain explicit conflict of laws rules. Furthermore, most of its provisions would only be relevant in connection with the European rules on non-contractual obligations, i.e. in the context of the rules of the Rome II (and not Rome I) Regulation.⁸⁰ Moreover, Art. 3(2) stipulates that the Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation and effect of a contract. Consequently, the Directive neither contains remedies to invalidate a contract, nor limits the general contract law remedies available to the consumer who has entered into a contract having been misled.⁸¹

In summary, the Directive does not touch upon contract law or conflict-of-laws rules in contractual issues in most cases. If it were to do so, according to Art. 9 of Rome I, its provisions as implemented could be interpreted as overriding mandatory rules.

12. Unification of Choice-of-Law Rules on Consumer Protection

It may be relevant in discussing this topic that a review of European consumer law has started beginning in 2008. The European Commission has adopted a Proposal⁸² that was planned to unify and review the provisions of the following four directives:

- Directive on unfair terms in consumer contracts
- Directive on distance contracts

78. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance). OJ L 149, 11.6.2005, 22.

79. See Art 4(1) of Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM(2003) final.

80. Cf. Giuseppe B. ABBAMONTE, *The UCPD and its General Prohibition* THE REGULATION ON UNFAIR COMMERCIAL PRACTICES UNDER EC DIRECTIVE 2005/29 18 (2007).

81. See *id.* at 16.

82. Proposal for a Directive of the European Parliament and of the Council on consumer rights. COM(2008) 614 final Cf. Hans-W. Micklitz, & Norbert Reich, *Crónica de una muerte anunciada: The Commission Proposal for a Directive on Consumer Rights*, COM. M. L. REV. 471-519 (2009); Willem H. Van Boom, *The Draft Directive on Consumer Rights: Choices Made & Arguments Used*, J. OF CONT. RES. 452-462 (2009)

- Directive on consumer sale of goods
- Directive on consumer contracts negotiated away from business premises.

The purpose of the document was to create unified substantive rules on these issues, i.e. to create unified rules on consumer protection. The technique used in the directive was total harmonization, instead of the formerly employed minimal harmonization.⁸³ Since total harmonization has received harsh criticism, the rules on unfair contract terms and consumer sales have been removed from the Proposal and a mixed approach of minimal and maximal harmonization was later adopted in the text. Consequently, the forthcoming legislative processes include only the following two directives:

- Directive on distance contracts
- Directive on consumer contracts negotiated away from business premises.

In our opinion – despite the validity of some criticism of the full harmonization method⁸⁴ – as regards PIL, unifying the rules would have been more useful than reducing the scope of the effort.⁸⁵ If the directive is adopted, according to the test, MSs will have 2 years to have it fully implemented in their legal systems. After the narrowing of its focus, the scope of the Directive will not cover consumer contracts in general, only some of the specific ones detailed above. In the amended proposal, the main goal was to protect consumers' digital rights and position in distance contracts.⁸⁶

The Directive will contain several provisions on PIL. Recital (58) of the Proposal states that:

“The consumer should not be deprived of the protection granted by this Directive. Where the law applicable to the contract is that of a third country, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) should apply, in order to determine whether the consumer retains the protection granted by this Directive.”

In our interpretation, this part is rather unnecessary, especially in light of article 25, which establishes the imperative nature of the Directive, stating that:

“If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive.”

83. Ewoud Hondius, *The Proposal for a Directive on Consumer Rights: The Emperor's New Clothes?* EUROPEAN REVIEW OF PRIVATE LAW 103 et seq. (2011), MICKLITZ & REICH, *Crónica...* at 463. et seq., at 474. et seq., at 480. et seq.

84. “And if that EU system follows the model of maximum harmonization, it is, as the Commission correctly contends, more ‘coherent’ – but the damage wrought at national level cuts still deeper.” Stephen Weatherhill, *Consumer Policy*, in Paul Craig and Gráinne de Búrca, *THE EVOLUTION OF EU LAW*, 865 (2011).

85. See *id.* at 867.

86. As a general rule, consumers will have 14 days if they wish to return goods bought at distance (over the Internet, by post or telephone).

Any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer.”

There are several questions related to the application of this Directive.

Firstly, the question arises about what to do if the Directive has not been properly implemented by a MS. In our opinion, the first sentence of Art. 25 is clear: the consumer may not waive the rights that were granted to him by the national implementation of its provisions. In case there is no such implementation, and – according to the Rome I Regulation – the MS’s law should be applied, there is no real legal right transposed. Consequently, in a contractual relationship, the consumer may not be protected based only on the Directive, since the Directive has no direct effect (or, more precisely, no horizontal direct effect) in the absence of implementation.

Secondly, after implementation, the consumer is protected from multiple sides: the parties cannot set a lower level of protection than the minimal requirements of the Directive. Moreover, they also cannot choose any country’s law that would lower the consumer’s protection. Whether that law is one of the MSs or that of a third state is irrelevant.

13. The Proposal on a Common European (Optional) Sales Law⁸⁷

In 2011, another proposal was created to provide businesses and consumers a tool they can apply in consumer sales contracts: the Proposal for a regulation on a common European sales law. The proposal will create an optional set of rules the parties can use: thus, the application of the provisions will be based on their opt-in clause. This reflects to Article (14) of the Preamble of Rome I regulation, which emphasizes that if the Union adopts, “in an appropriate legal instrument rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules”. Because of the application of this method, there are no rules on choice-of-law in the Regulation.

On the other hand, without going deeper in the analysis of the rules, we can ascertain that it will contain rules on its (or, more precisely, certain chapters’) mandatory nature (e.g. in Art. 47, 81, 108, 177, etc.) – which is a little bit weird, since it will only be adopted as an optional tool. How can an optional tool have mandatory character? The answer is that if the parties choose the applicability of the future regulation, they will have to respect certain parts of its provisions.

If we overview the above mentioned two rules (the sales proposal and the consumer law directive), which were/are planned to make a better system in EU contract law, we find that – just like in case of substantive contract law – the ongoing unification of PIL and the restructuring of sources seems to be lost in the jungle of EU contract law again. There will be two new rules, about the same or similar legal relationships, and both will contain certain elements which can effect PIL and the Rome I. Regulation.

⁸⁷ Proposal for a regulation of the European parliament and of the council on a common European sales law. COM (2011) 0635 final.

II. TRANSPOSING EU PIL PROVISIONS INTO HUNGARIAN LAW

A. General Notes About the Hungarian Legal System

As mentioned in the introductory notes of this article, the way the law of a mid-size MS reflects EU legislation has lots of lessons for other MSs – and indeed for US MSs⁸⁸ as well. This is the reason why EU MSs usually examine each other's rules when making amendments to their own PIL systems or when they are adopting a new PIL code.⁸⁹ Hungary, with its approximately ten million inhabitants, is one of the ten countries that joined the EU in 2004.⁹⁰

In Hungary, the main source of PIL is the Hungarian PIL Code (hereinafter referred to as: “*PIL Code*” or “*Code*”).⁹¹ This approach is common in Europe: in most of EU (i.e. in the majority of the civil law legal systems) PIL provisions were and in partly are traditionally codified in national codes on PIL.⁹²

88. For the US, even lessons taken from a federal state such as Switzerland may be of use, since the basics (federal level and local level) are very similar. For an early comparison of US and Swiss rules see e.g. Magdalene Schoch, *Conflict of Laws in a Federal State: The Experience of Switzerland*, 55 HARVARD LAW REVIEW, 738-779 (1942).

89. Cf. Christa Jessel-Holst, *The Bulgarian Private International Law Code of 2005*, in: Petar Sarcevic, Paul Volken, Andrea Bonomi (Eds.) YEARBOOK OF PRIVATE INTERNATIONAL LAW 376, 376, (2007).

90. For general information about Hungary, its legal system and institutions see: Tamás Böszörményi, Eszter Horváth, Tibor Kövér, Krisztina Orphanides: *Sources of Legal Information in Hungary: Part 1*. In: 6 LEGAL INFORMATION MANAGEMENT, 38-48 (2006), *Part 2.*, in 6 LEGAL INFORMATION MANAGEMENT, 127-135 (2006); Zsuzsanna Antal: *Introduction to Hungarian Law Research*. Available at <http://www.nyulawglobal.org/Globalex/Hungary.htm> (Sept. 21, 2011)

Please also note that the transformation of the Hungarian legal system started far earlier than accession; see THE TRANSFORMATION OF THE HUNGARIAN LEGAL ORDER 1985-2005 – TRANSITION TO THE RULE OF LAW AND ACCESSION TO THE EUROPEAN UNION (Eds. András Jakab, Péter Takács, Allan F. Tatham) 2007; Allan F. Tatham, *European Community Law Harmonization in Hungary*. 4 MAASTRICHT J. OF EU. AND COMP. L. 249-283 (1997).

91. Law-Decree No. 13 of 1979 on Private International Law. The latest version of the code is available to buy – unfortunately only in a package together with several other laws – at: http://www.complex.hu/CompLex-CD-HMJ@77_170_kiadvany.html. For the complex history and background of Hungarian Private International Law legislation see Zoltán Csehi: Comparative Study Of “Residual Jurisdiction” in Civil and Commercial Disputes in the EU. National Report for: Hungary. Available at http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_hungary_en.pdf (Sept. 20, 2011), Sarolta Szabó, *An overview of the Hungarian PIL Codification: Law Governing Contracts*, available at http://jmce.elte.hu/docs/Law_Governing_Contracts/HungarianPILContracts.pdf; Katalin Raffai / Sarolta Szabó: Selected Issues on Recent Hungarian Private International Law Codification, ACTA JURIDICA HUNGARICA (HUNGARIAN JOURNAL OF LEGAL STUDIES) 136-155 (2010); László Burián, *Hungarian Private International Law* in: YEARBOOK OF PRIVATE INTERNATIONAL LAW 157-188 (1999) Cf. Symeon Symeonides, *Recent Private International Law Codifications/Les codifications récentes du droit international privé* in: Brown, Karen B. / Snyder, David V. (Eds.), General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de L’Académie Internationale de Droit Comparé (under publication).

92. See e.g. the Austrian PIL Code [(IPRG – SR 291 Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht), the German PIL Code, which is the introductory act of the the German Civil Code [EGBGB Einführungsgesetz zum Bürgerlichen Gesetzbuche in der Fassung der Bekanntmachung vom 21. September 1994 (BGBl. I S. 2494; 1997 I S. 1061), das zuletzt durch Artikel 2 des Gesetzes vom 27. Juli 2011 (BGBl. I

Alongside the PIL Code, just like in most civil law countries, Hungary has an independent Civil Code (hereinafter referred to as: “Civil Code”).⁹³ The Civil Code contains the most important substantive provisions of substantive private law, including contract law.⁹⁴ Moreover, there are some important related acts such as the Introductory Act of the Civil Code (further on: “*Introductory Act*”), and the Code on Civil Procedure.⁹⁵

The Hungarian PIL Code is constructed similarly to most other European codes. Hence it is divided into the following parts:

- Chapter I: General Rules
- Chapter II: Persons
- Chapter III: Rights Attached to Intellectual Property
- Chapter IV: Proprietary Rights and Other Real Rights
- Chapter V: Contract Law and Liability for Damage Caused Outside Contracts
- Chapter VI: Inheritance Law
- Chapter VII: Family Law
- Chapter VIII: Labor Law
- Chapter IX: Jurisdiction
- Chapter X: Provisions of Procedural Law
- Chapter XI: Recognition and Execution of Decisions Passed Abroad

S. 1600) geändert worden ist)], the Italian Civil Code (Legge 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato, in Suppl. ordinario n. 68, alla Gazz. Uff. n. 128, del 3 giugno 1995, in regard of latter law, see Andrea Giardina, *Italy: Law Reforming the Italian System of Private International Law*. 35 INTERNATIONAL LEGAL MATERIALS 760-782 (1996). For another approach, see the French solution, where PIL has not been codified in one single Code, but can be found in different acts and also in several court decisions.

For a deeper review of the codes’ history, see Peter Hay, Patrick J. Borchers, Symeon C. Symeonides, CONFLICT OF LAWS 129-141 (2010). For the first version of the Hungarian Code see Ferenc Mádl, *Law-decree No. 13 of 1979 on private international law*. Ministry of Justice of the Hungarian People’s Republic, Budapest, 1982. However, please note that over the last thirty years, numerous amendments have been made to the Code.

93. Act No. IV of 1959 on the Civil Code of the Republic of Hungary. For text see <http://www.lawandtranslation.com/szolgaltatasaink/jogszabalyok>; Cf. Péter Gárdos: *Recodification of the Hungarian Civil Law*, 15 EUROPEAN REVIEW OF PRIVATE LAW 708-711 (2007)

94. The most important provisions of contracts and on special contracts can be found in Part IV. On obligations of the Civil Code, see Art. 198-606 thereof.

95. Act No. III of 1952 on the Code of Civil Procedure. The act contains the most important provisions concerning civil procedures, especially the provisions on civil litigation in Hungary.

B. Harmonization with the Rome I Regulation: repealed provisions of the PIL Code

Besides using several appropriate approaches, it must be noted that the fragmentation of EU PIL has posed some particularly difficult challenges for Hungarian legislators. The problems arose around two questions:

- Firstly, there are numerous EU regulations dealing with PIL. We have already mentioned the regulations of the applicable law, but there also exist a number of rules on jurisdiction, recognition and enforcement of court decisions.
- Secondly, the implementation of the fragmented directive law and directive PIL also pose several questions: should these rules be implemented in the substantive rules on these areas, or somewhere else?

In Hungary's legal system, the first major change to the conflict of laws system in the area of applicable law was the joining of the Rome Convention in 2006.⁹⁶ However, even before this date, due to general legal improvements of EC law, the PIL Code has been modified several times. The first of such modifications was in connection with EU procedural rules: Hungarian rules on jurisdiction, recognition and enforcement of foreign judgments were amended in order to conform to European developments. That time Hungary was not a MS. Thus, the aim of these modifications were only to have similar rules as other states do in Europe.⁹⁷

After the adoption of the Rome I and Rome II Regulations, several provisions of the Code had to be amended again; otherwise the Code would have contained rules which were not applicable, since the newer provisions of EU regulations were to be applied instead.⁹⁸ Hungarian lawmakers made further changes to the Code in 2009, adopting Act

96. The Convention entered into force in Hungary on 1 June 2006. For a historical viewpoint see Gábor Péter Palásti: The Future Impact Of The Rome Convention on Hungarian Conflict Rules, EUROPEAN INTEGRATION STUDIES, Miskolc, Volume 3. pp. 57-67 (2004), also available at <http://www.uni-miskolc.hu/uni/res/kozlemenyek/2004/THE-FUTURE.doc> (20 Sept., 2011).

97. These changes were mainly the consequence of the widespread use of the first Lugano Convention. However, please note that Hungary has not joined that Convention and neither has the country joined the other convention on the same subject, the 1968 Brussels Convention. Consequently, there was no serious direct necessity for these amendments. For texts see

<http://curia.europa.eu/common/recdoc/convention/en/index.htm?60,10> (30 Sept., 2011); Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 12, 16.1.2001, 1; Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. OJ L 338, 23.12.2003, 1. Cf. Gyula Gayer: Amendment to Law Concerning Jurisdiction, Recognition and Execution of Foreign Decisions in Hungary. In: *International Business Lawyer*, Vol. 29. 207-209. (2001) For European law background see Ulrich Magnus / Peter Mankowski (Eds.), *Brussels I Regulation*, Sellier, Munich, 2007, esp. Peter Mankowski: Chapter VII: Relations with Other Instruments p. 741 *et seq.*

98. Hungary has examined and in part used methods of the German and Austrian PIL Codes for achieving coherency with the Rome I and Rome II regulations. We have especially reviewed Art 35. and the provisions on obligations of the Austrian PIL Code (IPRG) and Art. 3 and the articles on obligations of the German PIL

No. IX. of 2009 on the amendment of the Hungarian Private International Law Code (hereinafter referred to as: “Amendment”).⁹⁹ The amendment erased the majority of rules governing contract law from the domestic body of law. The rules on consumer contracts (formerly Art. 28/A of the Code) and on labor contracts (formerly Art. 51 of the Code) were also set aside. Additionally, the provisions on torts were changed as well.¹⁰⁰ The amendments related to contracts have been in effect since December 17 2009.¹⁰¹

In contrast to labor law standards, erasing the provisions of consumer contracts may raise some questions. On one hand, the deletion of the rules on consumer contracts was certainly reasonable. On the other hand, some rules remain in the Introductory Act of the Civil Code regarding consumer law. These rules were protecting the consumer in case he/she concludes a contract with a foreigner, and do not allow the choice of foreign law if it would harm the consumer’s rights as set in Hungarian law in case – according to Art 28/A (rules on consumer law) of the PIL Code – Hungarian law were applicable to the contract [see Art. 5/C(1) Introductory Act]. The method of codifying PIL rules in the Introductory Act was strange, even for Hungary.¹⁰² The official clarification of the Introductory Act states that

“Our law governs the rules of consumer protection in contractual law with so-called mandatory rules, i.e. with rules requiring unconditional applicability regardless of the law chosen for the contract by the parties. However, these rules don’t completely exclude the application of the law of choice; they do so only as far as certain provisions of that law are contradictory to the Hungarian rules on consumer protection. In case of such partial collisions, the rules affected by the chosen law of another State shall be replaced with Hungarian rules on consumer protection. The aim of this rule is to ensure that the domestic consumer may not be deprived of the high protection afforded him by the domestic body of law. With respect to this goal, applying the rules on consumer protection laid down in the law of another State chosen by the parties is not impossible provided those rules are more in favor of the consumer.”

(Translation by the authors)

Code (EGBGB). Cf. STAUDINGER KOMMENTAR – EINLEITUNG ZU..., *supra* note 1 at Rn 32-40; Rn 30 – Anpassung des deutschen IPR an die Rom I-VO.

99. For a background see Raffai & Szabó: Selected Issues... *supra* note 1 at 137 *et seq.*

100. However, contrary to EU law, the choice of applicable law to obligations arising out of torts in the scope of the Code is still not available.

101. Beyond the changes related to the Rome I and II regulations, as a third area the amendment additionally tried to incorporate the latest developments from the field of European family law; see Case No. C-148/02. Carlos Garcia Avello v Belgium. EBHT 2003., I-11613.; Case No. C 353/06. Stefan Grunkin and Dorothee Regina Paul v Leonhard Matthias Grunkin Paul and Standesamt Niebüll. EBHT 2008. I-07639. Cf. Matthias Lehmann, *What's in a Name? Grunkin-Paul and Beyond*, YEARB. O. PR. INT. LAW 135-164 (2008); Johan Meeusen, *The Grunkin and Paul Judgment of the ECJ, or How to Strike a Delicate Balance between Conflict of Laws, Union Citizenship and Freedom of Movement in the EC, Judgment of the European Court of Justice of 14 October 2008*, ZEITSCHR. F. EUROP. PRIVATR. 186-201 (2010); Giulia Rossolillo, *Personal Identity at a Crossroad between Private International Law, International Protection of Human Rights and EU Law*, YEARB. O. PR. INT. LAW 143-156 and *id.* at 153 fn. 27 (2009).; Michaels, *The New European...* *supra* note 1 at 1632-1636.

102. Act No. CXLIX. of 1997. on the amendment of the 1959. Act No. IV. on the Civil Code of the Republic of Hungary, Article 11./3(b).

The aim of this provision was clearly to protect the consumer, and most importantly: to protect the Hungarian consumer against foreign law. The problem in our case is more of a technical one. Firstly, we may instantly notice that because the relevant rules of the Introductory Code were not erased, and only the main rules governing consumer contracts were deleted from the PIL Code, in its present state, the Introductory Code refers to rules that no longer exist. There is reference to Article 28/A of the Code, which was erased by the latest amendment after the adoption of the Rome I Regulation (as mentioned earlier). Secondly, if we ignore this anomaly, we may notice that the provision, although roughly “Hungarized” (composed from a Hungarian point of view), is similar to the choice-of-law limitations laid down in Rome I in the scope consumer contracts, but with a more nationalistic edge: the provisions of the mandatory Hungarian law shall not be evaded by the choice of law. Fortunately however, EU legislators enacted a wider scope, prohibiting the evasion of the mandatory rules of any MS if that results in a less favorable position for the consumer. We may state that after the deletion of the rules on consumer contracts from the Code, it would have been useful to also delete the aforementioned provision from the Introductory Act, since its presence there is unsettling and unnecessary.

The first lesson all MSs can learn from this problem is that keeping PIL provisions in PIL laws and not in any different law is simply a must: after amendments to the law in a specific field, the chance of making mistakes and leaving behind irrelevant provisions is smaller.

In the following section, we will summarize the implementation of the aforementioned EU directives.¹⁰³

C. Implementing Choice-of-Law Provisions of Directives on Non-Consumer Law Issues

1. Directive on Commercial Agents

The Directive on commercial agents was implemented in the Hungarian legal system by Act No. CXVII of 2000 on independent commercial agency contracts (hereinafter referred to as: “*Act on Commercial Agents*”)¹⁰⁴ four years before Hungary’s accession to the EU. Furthermore, the Civil Code of Hungary is also applicable to the general questions of contracts as a fundamental source. As we have also mentioned before, the Directive itself does not contain PIL provisions, and consequently, neither does the Hungarian act on commercial agents. However, the European restrictions on contracts were also implemented in Hungarian law. There are several sections to be found that

103. Please note that we will use the same chronology as in case of EU legislation: consequently, in order to have a better and easier overview, the order of review will be based on the adoption of the directives and not that of Hungarian laws.

104. For background, see Judit Budai, *New Law On Independent Commercial Agency Contracts*, BBLP CENTRAL EUROPEAN PRACTICE GROUP NEWSLETTER (2000), available at www.szecskay.hu/dynamic/jbuy012.pdf (Sep 30 2011).

cannot be derogated by the agreement of the parties. In these areas Hungarian legislators have generally copied the European provisions mechanically and used one of the following phrases:

“the parties’ agreement may not defer from paragraphs ...”

or

“the parties agreement may not defer from paragraphs ... to the detriment of the commercial agent”.

Such important provisions can be found in the following Articles:

- Art. 7 describes the Principal’s obligations such as paying the compensation to the agent [Art 7(1)], informing the agent about important circumstances [Art 7(2-3)], and the fact that the Principal must solely carry the risk of damage to objects passed to the agent [Art. 7(4)],.
- Art. 9-13 describes the Agent’s entitlement to commission,
- Art. 18-19 describes the indemnity granted to the Agent after termination of the agreement.

2. Directive on the Return of Unlawfully Removed Cultural Objects

The Directive on the return of unlawfully removed cultural objects was transposed into Hungarian law by Act No. LXXX of 2001 on the return of unlawfully removed cultural objects – just as in the aforementioned case, several years prior to joining the EU. The Act lays down some very similar rules to those set out in the Directive. According to these, ownership of the cultural object after return shall be governed by the law of the requesting MS. The return proceedings may not be conducted if removal from the territory of the requesting MS is no longer unlawful at the time of initiation the proceedings (Art. 5). The fundamental rules on the procedure outside the Act can be found in the general laws of Hungarian procedural law, particularly in the Code of Civil Procedure.

3. Directive on the Posting of Workers

The example of the Directive on the posting of workers also demonstrates why it may be dangerous to put PIL provisions into different EU laws. Astonishingly, the relevant conflict-of-laws rules of the Directive were not implemented into the PIL Code, but were placed among the substantive provisions of the Hungarian Labor Code¹⁰⁵ (hereinafter

105. Act No. XXII of 1992 on the Labor Code. Available at

referred to as: “*Labor Code*”).¹⁰⁶ Consequently, in a rather bizarre way, for a time – before the erasure of the rules on Labor Law from the PIL Code – there existed PIL rules on labor contracts in the PIL Code and PIL rules on the posting of workers in the Labor Code. In Hungary, the latter law governs the relationship between employer and employee and therefore contains, or more precisely, should contain only substantive law provisions.

The Labor Code approaches the issue of interim work from two sides: it governs the case of an employee from abroad posted to Hungary and the case of a posted or hired Hungarian employee carrying out work in another MS. In regard to the first instance (employee from abroad in Hungary), Art 106/A of the Code states that whereas an employee of a company from abroad performs his work within the territory of the Republic of Hungary the rules applicable shall be the provisions of the Hungarian Labor Code.”¹⁰⁷ Such questions are maximal working hours and minimal rest periods, minimal paid annual holidays, minimal rates of pay, the conditions for hiring-out of workers, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, protective measures for children and young people, and equality of treatment and other provisions on non-discrimination. Moreover, the Code declares that these provisions shall not be applied if there are more favorable rules which would govern the status of the posted (or hired-out) employee in the country of work or if the parties choose a law with a more favorable law [Art 106/A(1)].

With regard to the status of a Hungarian employee working abroad temporarily, the Code follows the provisions of the relevant Directive, and states that the provisions mentioned above shall be “*duly applied to the foreign posting (assignment, hiring out) of workers employed by Hungarian employers if these aspects are not covered by the laws of the country where the work is performed.*” In other words, in such cases, it is mainly the foreign (and not Hungarian) law that should be applied.

<http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex4.pdf> (30 Sept., 2011).

106. See Act No. XVI of 2001 on the Modification of Act XXII of 1992 on the Labor Code.

107. In certain instances, further rules can be found in other sources such as collective agreements. As regards employers engaged in construction, workers employed shall be subject to collective agreements covering the entire industry or an entire sector in lieu of the Labor Code, provided that the given collective agreement creates more favorable conditions for the employees (Art. 106/B).

D. Implementing Choice-of-Law Provisions of Directives on Consumer Law Issues¹⁰⁸

The largest part of Hungarian consumer law including substantive contract law, can be found in Act No. CLV of 1997 on Consumer Protection, while in questions of fundamental private law, the primary source is the Civil Code. Additionally, there are special rules contained in other acts which may have relevance. It is important to mention that most of EU consumer law has been implemented into the Civil Code. As mentioned before, although the Hungarian legal system is heavily influenced by German law, we do not formally follow the German approach of combining substantive rules (BGB)¹⁰⁹ and private international law (EGBGB)¹¹⁰ into one single act, or – more precisely – into an act and its introductory statute. Consequently, before erasing them upon adoption of the Rome I Regulation, general PIL rules on Consumer contracts had traditionally been codified in the PIL Code.

Despite this “neat” system, most directives have not been implemented into the PIL Code, but are diffused throughout our legal system, as we shall see. At the present time, we do not have general rules on consumer contracts, since all such issues are regulated in Rome I. We only have fragmented special rules implemented due to the pressure of the directives. We will now review the implementation of Directive law into the Hungarian legal regime.

1. Product Liability Directive

The provisions of the EU product liability directive were implemented mainly¹¹¹ in Act No. X of 1993 on Product Liability (hereinafter referred to as: “*Product Liability Act*”).

108. For its background and development see Judit Fazekas, *Development of Hungarian Consumer Law 1985-2005*, in András Jakab & Takács Péter & Allan F. Tatham (Eds.), *THE TRASFORMATION OF THE HUNGARIAN LEGAL ORDER 1985-2005 – TRANSITION TO THE RULE OF LAW AND ACCESSION TO THE EUROPEAN UNION* (2007)

109. Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 1 des Gesetzes vom 29. Juni 2011 (BGBl. I S. 1306) geändert worden ist <http://www.gesetze-im-internet.de/bundesrecht/bgb/gesamt.pdf> (Sept 30., 2011)

110. Einführungsgesetz zum Bürgerlichen Gesetzbuche in der Fassung der Bekanntmachung vom 21. September 1994 (BGBl. I S. 2494; 1997 I S. 1061), das zuletzt durch Artikel 7 des Gesetzes vom 23. Juni 2011 (BGBl. I S. 1266) geändert worden ist

<http://www.gesetze-im-internet.de/bgbeg/BJNR006049896.html>

111. For a general overview of the Hungarian product liability system see Freshfields Bruckhaus Deringer, *Hungary* In: *THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO PRODUCT LIABILITY* 2006. <http://www.freshfields.com/publications/pdfs/2006/productliability2006.pdf> Cf Ákos Köhidi, *Critical and Ameliorating Thoughts on Consumer Protection Concerning Product Liability*, 51 ACTA JURIDICA HUNGARICA (HUNGARIAN JOURNAL OF LEGAL STUDIES) 305-316. esp. 307-309 (2010) For an earlier stage see Mihály Maczonkai, *Hungarian Product Liability Case Law under Civil Code and the New*

In addition, fundamental rules on damages can be found in the Civil Code.¹¹² Just as its European counterpart, the Product Liability Act does not contain precise rules on its scope or any conflict of laws provisions. However, it does have explanatory provisions regarding its application, as did the Directive when it declared that the parties may not lower the level of consumer protection as set in the Directive.

Art. 9 of the Product Liability Act states that

“The exclusion or limitation of the responsibility of the producer is invalid.”

Thus, the rules of the Act can be viewed as internationally mandatory (imperative) provisions that must always be applied before the Hungarian courts, irrespective of any other law chosen.

2. Doorstep Selling Directive

After some changes, at the time of writing the implementation of the Doorstep selling directive can be found in Government Decree No. 213 of 2008 on contracts negotiated away from business premises. The Decree also contains most of the provisions of Directive 85/577/ECC for protecting the consumer. Art. 3 of the Directive states that the consumer may cancel a contract – without any kind obligation other than to take reasonable care of goods – within a period of at least seven days after the receipt of goods. In other words, the Hungarian decree grants the consumer eight days to cancel¹¹³ after receiving the goods or in case of a service contracts, after the conclusion of the contract.

The Decree does not contain any special PIL provisions. However, Art. 5 states that consumers may not waive the rights conferred on them by the Decree.¹¹⁴

3. Combination of Different Implementations: the Directive on the Unfair Terms in Consumer Contracts and the Directive on the Sale of Consumer Goods

If we observe the transposition of the Directives on consumer law, we may state that the Directive on unfair terms in consumer contracts and the provisions of the Directive on sales of goods to consumers suffered the most unjust treatment as regards the implementation of choice-of-law rules of directives in Hungary. The PIL rules of these

Product Liability Regime in: HUNGARY - FROM EUROPE AGREEMENT TO A MEMBER STATUS IN THE EUROPEAN UNION (Eds. Ferenc Mádl, Peter-Christian Müller-Graf) 109-123 (1996).

112. Art. 339 of the Civil Code states that “a person who causes damage to another person in violation of the law shall be liable for such damage”.

113. See Art. 4 of the Decree.

114. Or, more precisely, of his/her rights for cancellation of the contract and of his/her rights concerning his/her offer. However, provisions governing the legal consequences of withdrawal are not to be found in the Decree.

two Directives were incorporated into the Introductory Act of the Civil Code of Hungary (hereinafter referred to as: "Introductory Act").^{115 116} Introductory acts are unique tools used in a legal system such as Hungary's to introduce a complex act or code. The Introductory Act of the Civil Code included several provisions on the application of the Code, together with some explanatory notes. Subsequently, substantive rules of the abovementioned regulations were implemented in our Civil Code. Consequently – and we believe, wrongly – legislators decided to put the related PIL regulations into the introductory provisions of the related act. It would have been a better solution to incorporate them into our PIL Code, since this is the proper way of codifying PIL provisions in Hungary.

Furthermore, the two Directives are referenced in the Act in one complex sentence, despite the fact that these two issues are separate and also needed to be handled separately. In connection with the directives, Art. 5/C lays down the following provision:

"(2) If a contract or standard contract term previously made publicly available, or offered for application is in close relation with a Member State of the European Economic Area, the choice of a third state's law by the parties as the law applicable to the contract is invalid, if the aforementioned third state's law is in opposition with the implementation act transplanting Council Directive 93/13/EEC and Council and European Parliament Directive 1999/44/EC of the related Member State prohibiting divergence.

In regard to the related questions, the law applicable to the contract shall be the law of the aforementioned Member State instead of the law chosen by the parties."

These provisions – like other acts adopted to transplant other directives, see below – settle the issue of choice of law in the simplest possible matter: with reference to the related Directives themselves. The disadvantage of this solution is that legislators need to look up and study the Directives and review the provisions based on them. However, if the Act were to refer only to domestic law, reviewing the related provisions would be far more complicated, since the provisions have been incorporated alongside other substantive rules on contracts.

It is important to mention that not all choice of law is invalid: only those provisions which are contrary to the MS's law cannot be applied.

115. Decree 2 of 1978 on the Implementation of the Civil Code (its – complicated – proper name is Decree 2 of 1978 on Entry into Force and Enforcement of Act IV of 1977 on the Amendment and Consolidated Version of the Civil Code).

116. These directives were implemented by Act No. III of 2006 on the Amendment of Act No. IV of 1959 on the Civil Code and Other Laws for the Purpose of Harmonization in the Scope of Consumer Protection.

4. Directive on Distance Contracts¹¹⁷

The PIL provisions on distance contracts were transplanted into Government Decree No. 17 of 1999 on Distance Contracts.¹¹⁸ The Decree contains similar substantive rules to those of the Directive on Distance Contracts. Pursuant to Art. 11 of the Decree, if a contract that falls under the scope of the Decree is in close relation with a MS of the European Economic Area, the choice of a third State's law by the parties as applicable law to the contract is invalid if the third state's law is contrary to the law prohibiting divergence of the aforementioned MS transplanting Directive 1997/7/EC. In such cases, the law applicable to the contract shall be the law of the aforementioned Member State in place of the law chosen by the parties. The effects of these provisions are similar to those mentioned earlier for other directives.

5. Directive on E-Commerce

The main part of the E-Commerce Directive was implemented by Act No. CVIII of 2001 on Certain Issues of Electronic Commerce Services and Information Society Services. Just like the Directive, the Act builds a framework for electronic commercial services. Thus it is a combination of substantive contractual law and public law provisions (i.e. provisions related to and inspired by such matters).

The relevant Art. 3 of the Directive containing the country of origin principle was implemented in Art. 3/A of the Act. It states the following:

“The service provided by a service provider established in the territory of a Member State of the Agreement on the European Economic Area targeting the territory of the Republic of Hungary may not be restricted, unless the relevant authority or court needs to take measures

a) for protecting any of the following interests:

aa) the public order, in particular, the prevention, investigation and prosecution of criminal offences, including the protection of minors and actions against

117. For a general overview of the Hungarian electronic market see *Industry Briefing – Hungary retail: Overview of e-commerce*, ECONOMIST INTELLIGENCE UNIT – THE ECONOMIST (Sept 1, 2010), http://www.eiu.com/index.asp?layout=ib3PrintArticle&article_id=2017483786&printer=printer (Sept. 30., 2011); Mónika Horváth, *Benchmarking of Existing National Legal E-Business Practices*. DG ENTR/04/68 COUNTRY REPORT – HUNGARY, available at http://ec.europa.eu/enterprise/sectors/ict/files/hungary_en.pdf (Sept 30., 2011); Szabolcs Koppányi, *Highlights of the New Telecommunications Regulatory Framework in Hungary* 42 ACTA JURIDICA HUNGARICA – HUNGARIAN JOURNAL OF LEGAL STUDIES 255-260 (2001).

118. The Decree was formally implemented into the Hungarian legal system by Government Decree 2 of 2006 on the amendment of laws for the purpose of harmonizing in the scope of consumer protection (see Article 1.c).

incitement based on race, sex, religion or nationality and the violation of the human dignity of individuals;

ab) public health;

ac) public safety, including the interests of national safety and national defense;

ad) consumer interests, including the interests of investors; and

b) against a specific information society service that injures or seriously threatens the interests mentioned in subparagraph a) above; and

c) which is proportionate to the injury of the interest or the threat.”

(Translation by the authors)

As is evident, Hungary has added some explanatory provisions to the application of the exceptions of the Directive. Furthermore, all the (dubious) effects of the provision are the same as those of the rules of the Directive. On the other hand, we do not find the provisions which can be found in the Annex of the original Directive – consequently, the relationship of the Act with private international contractual law and consumer law is not as clear as in case of the Directive. Moreover, in such cases, seemingly the Rome I. regulation should be applied, since it is an EU regulation, unlike the Act.

6. Directive on the Distance Marketing of Consumer Financial Services

The main provisions of the Directive on the Distance Marketing of Consumer Financial Services have been implemented through Act No. XXV of 2005 on Distance Marketing of Financial Sectorial Contracts. Pursuant to Art. 12 of the Act, if a contract offering services of the financial sector settled through distance marketing is in close relation with a Member State of the European Economic Area, the choice of a third State's law by the parties as governing law for the contract is invalid, if the aforementioned law is contrary to the act prohibiting divergence of the mentioned Member State implementing Council Directive 2002/65/EC of the European Parliament. In such cases, the law applicable to the contract shall be the law of the aforementioned Member State in place of the law chosen by the parties.

As can be seen, these provisions are similar to those set out by the previously mentioned acts and decrees.

7. Timeshare Directive

The provisions of the earlier timeshare directive were implemented into a 1999 Government Decree.¹¹⁹ Later, the decree was repealed and a new law, Government

119. Government Decree No. 20 of 1999 on the contracts on acquiring the right to use immovable properties on a timeshare basis. Cf. 2/2006. (I. 4.) Order of Council altering certain orders of council for the purpose of harmonizing in the scope of consumer protection cf. Tekla Papp, *Der Timesharing-Vertrag in Ungarn: eine*

Decree No. 141 of 2011 was adopted in 2011 (henceforth: “*New timeshare decree*” or “*Decree*”), which also incorporates the provisions of the New time share directive.¹²⁰ The new law entered into force on September 21, 2011.

Art. 14(1) of the Decree declares that if the contract has an international element and the law applicable would be the law of a EU MS, the consumer may not disclaim its rights as set in the New timeshare directive or in the New timeshare decree.

Moreover, Art. 14(2) states that if the law applicable is a third state’s law, the consumer may not be deprived of the protection of the New timeshare directive and the New timeshare decree if:

- the real estate lies in a MS (or, more precisely: in a State of the European Economic Area), or
- even if the contract is not related to real estate, but the contract which is in dispute belongs to the business activity related to real estate of a company, and
 - this activity is conducted in a MS of the European Economic Area, or
 - this activity is targeted at a territory of a MS.

The choice of the body of law of a third State by the parties as governing law for the contract is invalid if the aforementioned body of law is in conflict with the public provisions. With regard to the question at hand, the law applicable governing the contract shall be the body of law of the aforementioned MS in place of the law chosen by the parties.

8. Directive on Unfair Commercial Practices

The fundamental rules of the Directive on unfair commercial practices were inserted into Act No. XLVII of 2008 Prohibiting Unfair Commercial Practices in Respect of Consumers¹²¹ and into the Competition Act.¹²² Just as the Directive, the latter act lacks explicit PIL provisions. Furthermore, the most relevant part of the Act on Unfair

rechtsvergleichende Analyse, ZEITSCHRIFT. F. GEMEINSCHAFTSPRIVATR. 141-147 (2009); Tekla Papp, *The Timesharing Contract in Hungary and in Europe*, ACTA JURIDICA HUNGARICA 483-494 (2008.); Tekla Papp: *Der Timesharing-Vertrag in Ungarn*, OSTEUROPA RECHT 154-159 (2011); Tekla Papp, *New Trends of Atypical Contracts in Hungary*, ACTA JURIDICA HUNGARICA 171-182 (2011.); Papp Tekla: *Der Timesharing-Vertrag in Ungarn - eine rechtsvergleichende Analyse*. COLLECTED PAPERS NOVI SAD FACULTY OF LAW SERBIA 393-408 (2009).

120. Please note that Hungarian legislation was somewhat behind with the adoption of these rules.

121. For background information see Zsófia Horváth, *Consumer Protection...*; Judit Firmiksz, *Special edition on consumer protection – Part 1, 2, 3 (Issues 314, 316, 317) in TAX & LEGAL ALERT OF PRICEWATERHOUSECOOPERS* (2008) available at <http://www.pwc.com/hu/en/publications/ado-hirujtag-2008.jhtml> (Sept 1, 2011).

122. Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, available at <http://www.gvh.hu/domain2/files/modules/module25/129678A2868BD0C90.pdf> (Sept. 30., 2011).

Commercial Practices deals with the Administrative Law background of unfair commercial practices.

CONCLUSIONS

A. The Problems of EU Law

In closing, we can be fairly certain that allowing the application of choice-of-law rules to contracts besides the Rome I Regulation in such a great numbers was not a good solution. On the other hand, there are many strong reasons for maintaining such legislation, especially consumer directive law.¹²³

First of all, in certain instances Art. 6 Rome I Regulation could not be applied and the general rules of Art. 4 would govern the law applicable to consumer contract. However, the provisions of the latter lead in most cases to the application of the law of the habitual residence of the company (professional) instead of that applicable to the consumer. Thus, they do not enforce the application of the mandatory rules protecting consumers. This dysfunction is redressed by the provisions of directive law.

Secondly, the scope of the directives is diverse: it would not be an easy job to create general rules for all kinds of consumer contracts. Furthermore, if the conflict-of-laws provisions had been cut from the directives and pasted into the Regulation, this would have resulted in chaos, as was the case for insurance contracts.

Thirdly, the law applicable to consumer and other contracts would be hard to define in cases involving Denmark, whose position – having opted-out of all EU legislation adopted in the area of JHA – would by itself lead to fragmentation.

Despite all these arguments, we still think that all the issues could have been settled had there been the intention to resolve them. We are eagerly observing the fate of this choice of law chaos in the directives. In our opinion, the EU should try to unify its rules on PIL. Firstly, we need general rules.¹²⁴ Secondly, at a minimum, we require less

¹²³ Some points of the argumentation was taken from DARÁZS, L.: 'A fogyasztói szerződések új kollíziós jogi szabályrendszere (Eng.: The New PIL System of Consumer Contracts)' in: *Magyar Jog (Hungarian Law)* 2010, p. 126.

¹²⁴ Christian Heinze, *Bausteine eines Allgemeinen Teils des europäischen Internationalen Privatrechts*, in: DIE RICHTIGE ORDNUNG... *supra* note at 105-127; Karl F. Kreuzer, Was gehört in den allgemeinen Teil eines europäischen Kollisionsrechts? in, Brigitta Jud & Walter H. Rechberger & Gerte Reichelt (Hrsg.), KOLLISIONSRECHT IN DER EUROPÄISCHEN UNION – NEUE FRAGEN DES INTERNATIONALEN PRIVAT- UND ZIVILVERFAHRENSRECHTES, 1-61 (2008); Rom I Und Rom II: Neue Perspektiven Im Europäischen Kollisionsrecht. ZENTRUM FÜR EUROPÄISCHES WIRTSCHAFTSRECHT – VORTRÄGE UND BERISCHTE, Nr. 173. at 49. fn. 151. Available at <http://www.zew.uni-bonn.de/pdf/Heft%20173%20Leible.pdf> (Sept. 30. 2011); Max Planck Institute for Comparative and International Private Law: *Comments on the European Commission's Proposal for a Regulation of the*

fragmentation: most PIL provisions should be built into Rome I.¹²⁵ Moreover, we believe there should also be a rethinking of the general rules of consumer contracts in the Rome I Regulation, since – as mentioned earlier – practice cannot and does not follow these rules.¹²⁶ Furthermore, we agree that the “center of gravity” in such cases should also be more clearly determined.¹²⁷

In our view, there are signs in the EU of an intention to reintegrate rules: this can also be seen regarding substantive consumer law – notwithstanding the fact that the scope of the new consumer law directive has been limited. We would be pleased to see this approach appear in the field of PIL as well.

B. The MSs' challenges

As asserted earlier, there are enormous differences in the methods¹²⁸ applied to the implementation of PIL provisions between the different EU MSs. If we examine the position of the Hungarian rules, we may state that Hungarian lawmakers have employed a range of solutions for implementing EU PIL rules on applicable law. Firstly, the Hungarian PIL Code was amended and certain parts removed (see the modification to the Rome I and II Regulations as reviewed earlier). Secondly, some rules were implemented in provisions of substantive law, as in case of posting of workers. These acts contain both choice-of-law rules and substantive provisions. Thirdly, certain provisions were incorporated in Hungary's Introductory Act to Civil Code, legislation dealing with the enforcement of the Civil Code. Fourthly, other rules were implemented in specific laws (decrees and acts) of certain areas. Typically, this was the most common solution, resulting in substantive law and PIL being mixed in the acts and decrees, just as they are in the EU directives themselves.

European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, 74 RABELS ZEITSCHR. F. AUSL. U. INT. PRIVATR. 527 (2010); Hans Joachim Sonnenberger, *Randbemerkungen zum Allgemeinen Teil eines europäisierten IPR*, in DIE RICHTIGE ORDNUNG... *supra* note at 227-246.

125 However, it must be mentioned that the exclusion of certain areas from the Rome I Regulation and the Rome Convention was partly made because of the special position of Denmark in the EU Justice and Home Affairs (JHA) system and the earlier conflict of laws regime. This means that Denmark has neither joined the Rome Convention, nor applies the rules (included PIL rules) that are adopted in the field of JHA. For its present positions see The Protocol on Denmark attached to the Treaty on the Functioning of the European Union: Protocol (No 22) On The Position Of Denmark. OJ C 83, 30.03.2010, 299. Ole Lando, O. & Peter Arnt Nielsen, *The Rome I Proposal*, 3 Cf. Ole Lando & Peter Arnt Nielsen, *The Rome I Proposal*... *supra* note 1 at 49-51

126. See footnote 1 in present article. For a contrary opinion, stating that the European solutions can be lessons for the United States, see James J. Healy, *Consumer Protection*... *supra* note 1 at 557.

127. George A. Bermann, *Rome I: A Comparative View*, in: ROME I... *supra* note 1 at 357.

128. Lajos Vékás, *Antizipierte Umsetzung von Verbraucherrichtlinien und das Internationale Privatrecht*, in: PRIVATE LAW IN THE INTERNATIONAL ARENA... *supra* note at 776-795.

In our opinion, there are signs of perplexity by the national legislator: the methods used are not consistent with each other. However, we are certain that this heterogeneity derives from the nature of EU law. Moreover, we are fairly convinced that only a small part of the legislation is misleading because of the application of less fortunate methods. It is evident that the fragmentation of EU law cannot be cleared up by the MSs. In the relationship between the EU and MSs, the latter are “followers”. Consequently, fragmentation easily seeps into the legislation of the MSs.¹²⁹ In order to shield their own PIL codes, the MSs have had to construct special rules which by-pass the formerly well built systems.

In summary, we would suggest some protectional measures for MSs. It would be essentially for civil law MSs to try to keep their PIL codes for PIL rules, even if the EU rules on substantive provisions do also contain PIL provisions. Failing this, they will reproduce the fragmentation of EU law itself.

129. Vékás: *Antizipierte...* *supra* note at 791-792.